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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 3

THE UNITED STATES OF AMERICA, EX REL. RICHARD EICHENLAUB, PETITIONER,

vs.

W. FRANK WATKINS, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION OF THE UNITED STATES FOR THE DISTRICT OF NEW YORK, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1948.

CERTIORARI GRANTED JUNE 27, 1949.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 22, 1949

—3489

[fol. 1] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel. RICHARD EICHENLAUB, Relator-Appellant,

against

W. FRANK WATKINS, as District Director of Immigration and Naturalization of the United States for the District of New York, or Such Person, if Any, as May Have the Said Richard Eichenlaub, in Custody, Respondent-Appellee

STATEMENT UNDER RULE 13

This appeal is taken from an order entered March 1, 1946, dismissing a writ of habeas corpus.

This proceeding was commenced by the filing of a petition for a writ of habeas corpus and the issuance of a writ of habeas corpus on November 8, 1945.

The return to the writ of habeas corpus was filed on January 8, 1946.

Argument was heard on January 8, 1946, by Hon. Samuel Mandelbaum, United States District Judge. On January 22, 1946, he handed down an opinion dismissing the writ.

This appeal was taken on March 22, 1946.

There has been no change in parties or attorneys since the commencement of the proceeding.

[fol. 2] WARRANT OF DEPORTATION

United States of America
Department of Justice
Philadelphia, Pa.

Warrant—Deportation of Alien
99622/629

No. A-5999792

To District Director of Immigration and Naturalization, New York, New York:

Or to any Officer or Employee of the United States Immigration and Naturalization Service.

Whereas, after due hearing before an authorized immigrant inspector, and upon the basis thereof, an order has been duly made that the alien Richard Eichenlaub who entered the United States at New York, New York, ex SS "Hamburg" on the 20th day of Aug. 1937 is subject to deportation under the following provisions of the laws of the United States to wit: The Act approved May 10, 1920 in that he has been found to be a member of the undesirable classes of alien residents enumerated in said Act, to wit, an alien who since August 1, 1914 has been convicted of conspiracy (18 U. S. C. 88) to violate an Act entitled, "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917 (22 U. S. C. 233).

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to deport the said alien to Germany, at the expenses of the appropriation, "Salaries and [fol. 3] Expenses, Immigration and Naturalization Service, 1946", including the services of an attendant, if necessary.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 9th day of October, 1945.

—— ——, Richard J. Powers, Acting Chief Exclusion and Expulsion Section.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

WRIT OF HABEAS CORPUS

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To: W. Frank Watkins, District Director of Immigration and Naturalization of the United States for the District of New York, or any other person having the custody of Richard Eichenlaub:

Greeting:

[fol. 4] You are hereby commanded, that the body of Richard Eichenlaub by you restrained of his liberty, as it

is said detained by whatesoever names the said Richard Eichenlaub may be detained, together with the day and cause of Richard Eichenlaub being taken and detained, you have before one of the Judges of the United States District Court in and for the Southern District of New York, in Room 506, at 10:30 A. M., on the 16th day of November, 1945, then and there to do, submit to and receive whatsoever the said judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable John C. Knox, United States District Judge, this 8th day of November, 1945.

William V. Connell, Clerk.

Writ allowed: 11/8/45.
William Bondy, U. S. D. J.

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS

To the District Court of the United States for the Southern District of New York

The petition of Richard Eichenlaub, respectfully alleges and shows:

1. That he was born in Germany and was lawfully admitted into the United States on February 30th, 1930.

2. That on the 17th day of November, 1936, your petitioner became a citizen of the United States.

3. That your petitioner resided in the United States until 1937 when he returned to Germany. That he re-entered the United States on August 20th, 1937, as a United States citizen.

4. That on or about the 19th day of April, 1944, your petitioner was served with a warrant of arrest, dated April 19th, 1944, issued by the Department of Justice.

[fol. 6] 5. That your petitioner was accorded a hearing under the warrant of arrest and on January 11th, 1945, was served with proposed findings, conclusions and an order

recommending that your petitioner be deported to Germany on the following charges:

1) The Act of February 5, 1917, in that, on or after May 1, 1917, he has been sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after entry, to wit: Title 18 U. S. C. Sec. 88 (did conspire to act as agent for a foreign government without being registered, and as such agent to accumulate information for transmittal to a foreign government);

2) The Act of February 5, 1917, in that, he admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to entry into the United States, to wit: Title 18, U. S. C., Sec. 88, (did conspire to act as agent for a foreign government without being registered and as such agent to accumulate information for transmittal to a foreign government); and

3) The Act of May 10, 1920, in that, he has been found to be a member of the undesirable classes of alien residents enumerated in Section 1 of said Act, to wit: An alien who since August 1, 1914, has been convicted of conspiracy (18 U. S. C. 88) to violate a part of an act entitled "An act to punish acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage, and better, to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917, (22 U. S. C. 233.)

[fol. 7] 6. That your petitioner excepted to said proposed findings, conclusions and order and appealed to the Board of Immigration Appeals in Washington, D. C.

7. That on July 16th, 1945, your petitioner was given a hearing before the said Board of Immigration Appeals.

8. That on the 29th day of October, 1945, your petitioner was informed by letter, dated October 29th, 1945, that a warrant had been issued on October 9th, 1945, directing that your petitioner be deported to Germany.

9. That your petitioner has never received a decision on his appeal to the Board of Immigration Appeals.

10. That the warrant of arrest and the warrant of deportation issued herein are without authority of law; the proceedings thereunder were unfair and the findings and conclusions are not based on any evidence adduced at the hearings or otherwise; and that the warrant of deportation is based on an erroneous construction of the law.

11. That no previous application has been made for the writ asked for herein, except that an application was made to Hon. John C. Knox, one of the Justices of this Court, by Katharina Eichenlaub, wife of the petitioner, on the 31st day of October, 1945, and a writ of habeas corpus was thereupon issued, dated the 31st day of October, 1945, and returnable before this Court in Room 506, at 10:30 A. M., on the 2nd day of November, 1945, and which was adjourned to November 9th, 1945. That your petitioner's wife had obtained the issuance of the writ of habeas corpus, dated October 31st, 1945, in the erroneous belief that the United States Attorney General had issued an order for the deportation of your petitioner as an alien enemy.

[fol. 8] 12. That on the return day, November 9th, 1945, the application and writ, applied for on October 31st, 1945, will be withdrawn.

13. That notwithstanding all of the foregoing, a warrant of deportation has been issued for the deportation of your petitioner to Germany and your petitioner is now illegally detained, imprisoned, and restrained of his liberty by the respondent at Ellis Island, New York Harbor, within the jurisdiction of this honorable court.

Wherefore, your petitioner respectfully prays that a writ of habeas corpus may issue directed to the said W. Frank Watkins, as District Director of Immigration and Naturalization, requiring him to bring and have your petitioner before this court at a time to be by this court determined, together with the true cause of the detention of your petitioner, to the end that due inquiry may be had and that this court may proceed to determine the facts of this case in that regard and the legality of your petitioner's imprisonment, restraint and detention and thereupon to dispose of this case as law and justice may require.

Richard Eichenlaub.

[fol. 9] *Duly sworn to by Richard Eichenlaub. Jurat omitted in printing.*

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

RETURN TO WRIT OF HABEAS CORPUS

SOUTHERN DISTRICT OF NEW YORK, ss.:

ALVIN LIEBERMAN, being duly sworn, says that he is an Assistant District Counsel for the New York District of the Immigration Service of the United States at 70 Columbus Avenue, New York, New York; that he in his official capacity is authorized to make and in behalf of the respondent hereby makes the following return to the writ of habeas corpus herein.

In compliance with the direction of this Court, the body of the said alien in his own proper person is produced herewith before this Court at the time specified in the writ.

It is respectfully urged that upon its face the petition upon which the writ was granted is insufficient in law, and that the writ should therefore be quashed because:

(a) The petition does not allege facts to show that the proceedings of the Department of Justice upon which was issued the order of exclusion pursuant to which the said alien is held, were not regular, fair and in compliance with [fol. 11] the statute applicable in such cases, nor facts from which this Court can determine that the proceedings were either irregular, unfair or not in compliance with said statute;

(b) The petition does not allege any facts which entitled this Court to review the findings and conclusion of the Department of Justice upon which the order of exclusion was issued;

(c) It is not alleged that there was no evidence before the Department of Justice upon which it based or could have based its findings and conclusion in accordance with which the order of exclusion was issued;

(d) It does not appear by allegation of facts that the issues sought by the petition now to be litigated in this Court have not already been determined by the Department of Justice adversely to the said alien in proceedings which were regular, fair and in compliance with the statute applicable thereto.

As appears by the records of the Department of Justice of the United States with respect to the above-named alien, copies of which are produced and filed herewith as part of this return:

1. The relator is an alien who was born in Germany on June 1, 1905. He first entered the United States on February 23, 1930 and was naturalized on December 17, 1936 in the United States District Court for the Southern District of New York. Following his naturalization, relator visited Germany and returned to this country on August 20, 1937, at which time he was admitted as a citizen of the United States. He has resided here since said date.

2. The relator was convicted in the United States District Court for the Eastern District of New York on September 3, 1941 of having conspired to act as an agent for a foreign Government without being registered, and as [fol. 12] such agent, to accumulate information for transmittal to a foreign Government (18 U. S. C. 88; 22 U. S. C. 233). On January 2, 1942, he was sentenced on this charge to imprisonment for 18 months and fined $1,000. On January 25, 1944, the relator's naturalization was revoked in this Court.

3. The alien was accorded a hearing on September 25, 1944, under a warrant of arrest which issued April 19, 1944. At the conclusion of the hearing the Presiding Immigration Inspector found that the alien was deportable.

4. The relator filed exceptions to the proposed findings and conclusions of law with the Board of Immigration Appeals. Upon review, the Board of Immigration Appeals ordered the alien to be deported. It concurred in the recommendation of the Presiding Immigration Inspector that the alien was deportable because by "The Act of May 10, 1920, in that he has been found to be a member of the undesirable classes of alien residents enumerated in Section 1 of said Act, to wit: An alien who since August 1, 1914 has been convicted of conspiracy (18 U. S. C. 88) to violate a part of an act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917, (22 U. S. C. 233)."

5. The hearing herein was fair and just and was not unreasonable or arbitrary.

6. The conclusion of the Board of Immigration Appeals to deport the alien to Germany is duly supported by the evidence, and there appear to be no grounds upon which the order of deportation may be determined to have been illegally made.

[fol. 13] 7. That the alien did receive a letter from the Immigration and Naturalization Service on October 29, 1945, stating that on October 9, 1945, a Warrant of Deportation had been issued directing that he be deported to Germany (see petition in support of writ, paragraph 8).

8. Since the Attorney General, by formal order, has ordered the alien deported to Germany, he is not entitled to be released on bail pending his deportation.

Wherefore, deponent prays that the writ of habeas corpus herein be dismissed, and that the relator be remanded to custody.

Alvin Lieberman, Assistant District Counsel.

Sworn to before me this 8th day of January, 1946.
Daniel Tanenbaum, Notary Public, Kings Co.

[fol. 14] IN UNITED STATES DISTRICT COURT

OPINION—January 22, 1946

The writ raises several questions. First, as to the fairness of the proceedings before the immigration authorities. In his brief, relator appears to have abandoned this contention. Nevertheless the court finds from the examination of the record that the proceedings were both fair and adequate and relator has no cause for complaint on that score. Second, as to a claimed erroneous construction of law. Relator urges that he pleaded guilty to having conspired to violate Section 233 of Title 22, U. S. C.; that this statute was renumbered to read Section 601 of the same title by the Act of March 28th, 1940, and provides for a greater penalty than provided for in Section 233. That this claimed repugnancy between the old and new statutes resulted in a repeal of the former; that relator was not deportable because Section 157 of Title 8, U. S.

C. A. which is the deporting statute does not include or mention Section 601.

There is no force to this contention at all since it is improperly assumed that Section 601 repealed Section 233. It is only amendatory and the deporting statute (Section 157, Title 8, U. S. C. A.) did not have to include the renumbered section. As a matter of fact, the relator was indicted, convicted and sentenced under Section 233 when actually Section — was already in effect. If any further evidence were needed, this would indicate that Section 601 did not repeal Section 233.

Aside from the foregoing, even if the law under which relator was convicted had been repealed, the conviction as a basis for subsequent deportation remained unaffected. Mahler v. Eby, 264 U. S. 32, p. 39-40. I must therefore conclude that relator's conviction of conspiring to violate Section 233 rendered him an undesirable alien subject to [fol. 15] deportation by order of the Attorney General without any further qualification. Mahler v. Eby, supra.

The court has examined the other points raised by the relator and finds them without merit.

Writ dismissed.

Dated, January 22, 1946.

Samuel Mandelbaum, U. S. D. J.

In United States District Court, Southern District of New York

Civ. 33-579

United States of America, ex rel., Richard Eichenlaub, Relator,

against

W. Frank Watkins, as District Director of Immigration and Naturalization of the United States for the District of New York, or such person, if any, as may have the said Richard Eichenlaub, in custody, Respondent

Order Dismissing Writ—February 28, 1946

The writ of habeas corpus in the above-entitled matter having come on to be heard before this Court on January

8, 1946, and after hearing Joseph J. Reville, Esq., attorney for the relator, in support of the writ, and John F. X. McGohey, United States Attorney for the Southern District of New York, John F. Ryan, Esq., of counsel, in opposition thereto, and upon the petition for the writ of habeas [fol. 16] corpus, the return thereto, and upon all the papers and proceedings heretofore had herein, and upon the filed opinion of the Court, it is

Ordered that the writ of habeas corpus be and the same hereby is dismissed; and it is

Further Ordered that the relator be remanded to the custody of the District Director of Immigration and Naturalization, Department of Justice, at Ellis Island, New York Harbor, New York.

Dated: New York, N. Y., February 28, 1946.

Samuel Mandelbaum, U. S. D. J.

In United States District Court

[Title omitted]

Notice of Appeal

Sirs:

Please take notice that Richard Eichenlaub, the relator herein, hereby appeals to the Circuit Court of Appeals for [fol. 17] the Second Circuit from the order entered in this proceeding on March 1st, 1946, dismissing the Writ of Habeas Corpus, and from each and every part of said order.

Dated, New York City, March 22nd, 1946.

Joseph J. Reville, Attorney for Relator, 201 West 72nd Street, Borough of Manhattan, New York 23, New York.

To:

The Clerk of the United States District Court, Southern District of New York, Foley Square, New York City.

To:

John F. X. McGohey, United States Attorney, Attorney for Respondent, Foley Square, New York City.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true and correct transcript of the record of the said District Court in the above-entitled cause, as agreed on by the parties.

Dated, New York, May 28, 1946.

Joseph J. Reville, Attorney for Relator-Appellant.
John F. X. McGohey, Southern District of New York, United States Attorney for the Attorney for Respondent-Appellee.

[fol. 19] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 20] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1947

No. 254

(Argued April 14, 1948. Decided May 3, 1948)

Docket No. 20965

UNITED STATES OF AMERICA, ex Rel. RICHARD EICHENLAUB, Relator-Appellant,

v.

W. FRANK WATKINS, as District Director of Immigration and Naturalization, etc., Respondent-Appellee

Before Swan, Clark and Frank, Circuit Judges

Appeal from an order of the United States District Court for the Southern District of New York dismissing a writ of habeas corpus. Affirmed.

Harold K. McKee, for appellant.

John F. X. McGohey, United States Attorney for the Southern District of New York (John F. Ryan, of counsel) for appellee.

[fol. 21] Eichenlaub, the relator, entered the United States in 1930 and was naturalized in 1936. In 1941, he was convicted of the crime of having conspired to act as an agent for a foreign government without having registered. The indictment referred to 22 U. S. C. A. § 233. By the Act of March 28, 1940, § 233 had been amended so as to increase the penalty;[1] it now appears as 22 U. S. C. A. § 601. The Act of May 10, 1920,[2] provides in part: "* * * That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, upon the warrant of the Secretary of

[1] 54 Stat. 80.

[2] 41 Stat. 593, 594. Under the authority of 1940 Reorg. Plan No. V, 54 Stat. 1238, "Attorney General" is substituted for "Secretary of Labor." The Act is codified in 8 U. S. C. § 157; the words of the statute are, of course, controlling.

Labor, be taken into custody and deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917, entitled 'An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States,' if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States, to wit: * * * (2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts, the judgment on such conviction having become final, namely: (a) An Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917, or the amendment thereof approved May 16, 1918; * * *" On January 25, 1944, in deporturalization proceedings in the district court for the Southern District of New York, a [fol. 22] decree was entered which cancelled relator's certificate of naturalization. Subsequently, administrative deportation proceedings were begun against him. He was arrested and given an administrative hearing. In those proceedings, a finding was made that he "is an undesirable resident of the United States." On October 9, 1945, a warrant of deportation was issued which stated in part the following: "Whereas, after due hearing * * * an order has been duly made that the alien Richard Eichenlaub * * * is subject to deportation under the following provisions of the laws of the United States, to wit: The Act approved May 10, 1920, in that he has been found to be a member of the undesirable classes of alien residents enumerated in said Act, to wit, an alien who since August 1, 1914 has been convicted of conspiracy (18 U. S. C. 88) to violate an Act entitled 'An Act to punish acts of interference with the foreign relations * * *" approved June 15, 1917 (22 U. S. C. 233)." Relator brought habeas corpus proceedings. From an order dismissing the writ he appeals.

FRANK, Circuit Judge:

Relator contends that 22 U. S. C. A. § 233 was repealed and that therefore he was not convicted of any crime enumerated in 8 U. S. C. A. § 157. We cannot agree; the

1940 Act did not repeal but merely increased the penalty prescribed in 22 U. S. C. A. § 233.[3] Nor do we agree with his contention that 8 U. S. C. A. § 157 does not include one who was a citizen when convicted but who is subsequently denaturalized. We think the decree of denaturalization [fol. 23] relates back, at least for this purpose. Cf. *Rosenberg* v. *United States*, 60 F. (2d) 475 (C. C. A. 3).

He also urges that the deportation warrant is defective, as not in accord with 8 U. S. C. A. § 157, since it states that he is "a member of the undesirable classes of alien residents enumerated in said Act" and does not state that he, as an individual, has been found to be an "undesirable resident." He cites *Mahler* v. *Eby*, 264 U. S. 32. But there the Court said (p. 43) that the defect in the warrants had not been met by other matter in the record. Here we have an explicit finding in the administrative proceedings that relator "is an undesirable resident." It would serve no useful purpose to remand to permit amendment of the warrant to conform to that finding.

Affirmed.

[3] If he means to contend that the indictment was insufficient, the contention is frivolous. As the court in the criminal suit had jurisdiction of both his person and the subject matter, he cannot, in a habeas corpus proceedings, attack the conviction.

[fol. 24] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of May one thousand nine hundred and forty-eight.

Present: Hon. Thomas W. Swan, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

UNITED STATES ex Rel. RICHARD EICHENLAUB, Relator-Appellant,

v.

W. FRANK WATKINS, etc., Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 25] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States ex Rel. Richard Eichenlaub v. W. Frank Watkins. 254. Judgment. United States Circuit Court of Appeals, Second Circuit. Filed May 3, 1948. Alexander M. Bell, Clerk.

[fol. 26] UNITED STATES OF AMERICA,
Southern District of New York:

I, Alexander M. Bell, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 25, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States of

America, ex Rel. Richard Eichenlaub, Relator-Appellant, against W. Frank Watkins, as District Director of Immigration and Naturalization of the United States for the District of New York, etc., Respondent-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of September in the year of our Lord one thousand nine hundred and forty-eight, and of the Independence of the said United States the one hundred and seventy-third.

Alexander M. Bell, Clerk, by A. Daniel Fusaro, Deputy Clerk. (Seal.)

[fol. 27] [Stamp:] Office of the Clerk, Supreme Court, U. S., Jul. 30, 1948

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. —

UNITED STATES OF AMERICA, ex Rel. RICHARD EICHENLAUB, Petitioner,

vs.

W. FRANK WATKINS, as District Director of Immigration and Naturalization, etc.

ORDER

Upon consideration of the application of counsel for the petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Sept. 3rd, 1948.

Fred M. Vinson, Chief Justice of the United States.

Dated this 30th day of July, 1948.

[fol. 25] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 27, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The order of November 15, 1948, denying certiorari is vacated. The case is assigned for argument immediately following Willumeit v. Watkins, No. 817, October Term, 1948.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT, U.S.

FILED
SEP 3 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 260 #3

UNITED STATES OF AMERICA ex rel. RICHARD EICHENLAUB,
Petitioner,

against

W. FRANK WATKINS, as District Director of Immigration and Naturalization of the United States for the District of New York, or such person, if any, as may have the said RICHARD EICHENLAUB in custody,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

CHARLES E. WALLINGTON,
Attorney for Petitioner,
4 South 15th Street,
Philadelphia 2, Pa.

GEORGE G. SHIYA,
HALLAM M. RICHARDSON,
115 Broadway,
New York 6, New York,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No.

UNITED STATES OF AMERICA, ex rel. RICHARD EICHENLAUB,

Petitioner,

against

W. FRANK WATKINS, as District Director of Immigration and Naturalization of the United States for the District of New York, or such person, if any, as may have the said RICHARD EICHENLAUB in custody,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Richard Eichenlaub, petitioner above named, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit unanimously affirming the order of the United States District Court for the Southern District of New York dismissing a Writ of Habeas Corpus.

Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 167 Fed. (2d) 659. It is printed as Appendix I hereto. The opinion of the District Court is set forth (R. 14). The judgment of affirmance of the Circuit Court of Appeals was entered on May 3, 1948.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

Statutes Involved

The statutory provisions involved herein are part of the Immigration Act of May 10, 1920, c. 174, 41 Stat. 593 (8 U. S. C. 157), and Title 18, Section 88 of the United States Code.

Reference is made in the opinions below to the Act of June 15, 1917, c. 30, Title 8, 40 Stat. 226 (22 U. S. C. 233), and the Act of March 28, 1940, c. 72, 54 Stat. 80 (22 U. S. C. 601), but it is contended that they were wrongly applied and do not properly concern this petitioner

Questions Presented

1. Whether the special deportation statute here involved, Act of May 10, 1920, extends to the offense referred to in the first count of the indictment to which the petitioner pleaded guilty.

2. Whether there was a complete failure to prove that petitioner's conviction rested on the 1917 Act apart from

the 1938, 1939 and 1940 Acts relating to espionage and/or non-registration of agents of a foreign government, so as to render the conviction invalid and no basis for deportation.

3. If the first count of the indictment, to which the petitioner pleaded guilty, is not so vague and uncertain as to create serious doubt that the petitioner was even charged with violating any section enumerated in the Act of May 10, 1920, conviction of which would make the petitioner subject to deportation.

4. Whether a judgment of denaturalization may be entered by default on consent of the petitioner without a hearing.

5. Whether in the circumstances of this case the petitioner's conviction was the conviction of an alien within the meaning of the Act of 1920.

6. Whether the warrant of deportation contains lawful ground of deportation.

Statement of Facts

The petitioner was lawfully admitted into the United States in February, 1930. He became a citizen of the United States on November 17, 1936. He is married and his wife is a resident of the United States. At present the petitioner is in the custody of the United States Immigration Service and is held on Ellis Island subject to deportation. He was placed on parole on July 29, 1948, pending the outcome of this proceeding.

On January 2, 1942, the petitioner was sentenced by the United States District Court for the Eastern District of New York for a term of imprisonment for eighteen months following his plea of guilty to one of two counts of an indictment charging him with violation of Section 88, Title 18 of the United States Code.

On August 13, 1943, an action was instituted in the United States District Court for the Southern District of New York to cancel the denaturalization certificate of the petitioner on the ground of fraud. On January 25, 1944, upon the consent of the petitioner, a judgment was entered in the said Court cancelling his American citizenship.

Thereafter deportation proceedings were instituted against the petitioner. An order was made therein recommending that the petitioner be deported to Germany. An appeal therefrom was taken to the Board of Immigration Appeals which directed deportation on the following charge:

> "The Act approved May 10, 1920, in that, he has been found to be a member of the undesirable classes of alien residents enumerated in Section 1 of said Act, to wit: An alien who since August 1, 1914, has been convicted of conspiracy (18 USC 88) to violate a part of an act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage, and better, to enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917 (22 U. S. C. 232)."

A warrant of deportation was issued on October 9, 1945, directing that the petitioner be deported (R. 2). The petitioner thereafter applied for a Writ of Habeas Corpus on the grounds that the warrant of deportation was based on an erroneous construction of Section 157 of Title 8, U. S. C., the deporting statute, in that said statute does not provide for the deportation of the petitioner and that the petitioner is therefore illegally detained, imprisoned and restrained of his liberty.

Although the writ was granted by Honorable William Bondy, U. S. D. J., the petitioner was brought before and the matter was heard by Honorable Samuel Mandelbaum of the same Court, who dismissed it with a written opinion (R. 14).

From the order of dismissal the petitioner appealed to the Circuit Court of Appeals, Second Circuit. The order appealed from was affirmed by a written opinion (Appendix I).

The respondent's return seeks to attribute to the petitioner Eichenlaub (the owner of a restaurant frequented by one or two customers later found to be trained undercover operators for the Reich) some guilty knowledge of violation of several penal statutes with which he was in nowise connected and to which he did not plead guilty.

The petitioner Eichenlaub pleaded guilty to the first count only of the indictment, which charged a conspiracy under U. S. C., Title 18, Section 88, and an overt act involving him in the alleged system and organization operated in the United States for the purposes of obtaining, collecting and receiving information of a military, naval, commercial or industrial nature, and data concerning the movement and description of cargo ships of American and foreign registry. The said overt act consisted of a conference he had with an individual named Eberling on June 10, 1941, within a month of the time when he was indicted and several months prior to the commencement of the war between the United States and Germany.

The petitioner, who had no criminal record prior to the conviction on a plea of guilty to the above count, which was the lesser of the two counts in the indictment, had as the only alternative the matter of standing trial with thirty-two other defendants, some of whom were alleged to be in communication with the enemy by radio, on a sweeping conspiracy charge of espionage. Subsequent developments at that trial served to reveal how some of the defendants, notably the petitioner Eichenlaub, were innocent sources of information used by trained and clever undercover agents operating in this country as mediums for procuring isolated data later assembled by ingenious methods to convey intelligence to foreign central intelligence headquarters.

The said conspiracy charge was well analyzed by the Circuit Court of Appeals for the Second Circuit in an opinion written on November 8, 1945, upon an appeal taken by one of the thirty-three defendants who stood trial and was convicted and sentenced after Mr. Eichenlaub's plea, at which time the Court discussed at considerable length the very underhanded and surreptitious devices to which that appellant, one Heine, resorted to deceive and conceal from those with whom he associated or from whom he obtained information his real intentions and purposes. See *United States* v. *Heine*, 151 F. (2d) 813.

To attribute "undesirability", "deportability", "moral turpitude" or any felonious purposes to the petitioner on the basis of his plea to a statutory conspiracy charge on which he received the lightest sentence imposed on any of his co-defendants is to revert to the hysteria of those first Pearl Harbor days during which the jury who tried most of those indicted with him was stampeded into rubber stamping all the defendants before them as guilty of everything charged, and is to disregard the sane judicial standards which the appellate courts have since laid down.

Assignment of Errors

The Circuit Court of Appeals erred:

1. In affirming the order dismissing the writ.

2. In upholding the sufficiency of Count 1 of the indictment to which the petitioner pleaded guilty, although it failed to state facts sufficient to constitute an offense involving moral turpitude within the contemplation of 8 U. S. C. 157.

3. In holding that the conviction under Count 1 of the indictment was for a crime enumerated in 8 U. S. C. 157.

4. In holding that a judgment cancelling petitioner's citizenship on consent should not have been entered without presentation by the Government of clear and unequivocal ex parte proof to support the complaint.

5. In upholding the validity of the petitioner's decree of denaturalization and holding that the said decree relates back for the purpose of making the petitioner an alien when convicted.

6. In failing to remand the case although the warrant of deportation did not state that a finding had been made that the petitioner individually was an undesirable resident as required by the Act of 1920.

Reasons for Granting the Writ

1. The reference in the indictment to Title 22, U. S. C. 233, confuses and misstates the nature of the charge to which relator pleaded,

2. The basic purpose and principle of Section 233, in Chapter 5, concerning preservation of friendly foreign relations, is so utterly different from Section 601 and following sections, in the new Chapter 11, concerning foreign agents and propaganda, that regardless of the similarity of language between them, the first count of the indictment, to which Mr. Eichenlaub was persuaded to plead guilty, should now, in the light of all the circumstances, be vacated as void or so grossly misleading as to require that the Court set it aside.

3. Even prior to the rule of the *Heine* case the petitioner's plea to the first count of the July, 1941 indictment clearly did not imply guilt of espionage, for acts against this nation's official guests (diplomats, consuls, etc.) however rude or prohibited are entirely distinct from spying.

4. The judgment of denaturalization is void for the reason that Section 738 of Title 8, U. S. C., does not provide for the revocation of naturalization by consent.

5. The judgment of denaturalization is void for the reason that said judgment does not comply with the Rules of Civil Procedure.

6. A proceeding to cancel a certificate on the ground of fraud is a suit in equity and the burden of proof is on the prosecution to establish and prove its case.

7. In a proceeding to cancel a certificate of naturalization on the ground of fraud the Government must present evidence of a clear, unequivocal and convincing nature.

8. The Court lacked jurisdiction to enter a judgment of denaturalization.

9. The petitioner's conviction was not the conviction of an alien within the meaning of the Act of 1920.

10. Under proper circumstances a judgment cancelling citizenship can be vacated and set aside, and time should not act as a barrier in the instant case.

11. The warrant of deportation contains no lawful ground of deportation.

Prayer for Writ

WHEREFORE, your petitioner prays for a writ of certiorari to be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a complete transcript of the record and all proceedings in the instant cause, so that this cause may be reviewed and determined by this Court, and that the judgment of the United States Circuit Court of Appeals for the Second Circuit may be reversed and that the petitioner may be granted such other and further relief as may seem proper.

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BRIEF IN SUPPORT OF PETITION

POINT I

The reference in the indictment to Title 22, U. S. C. 233, confuses and misstates the nature of the charge to which relator pleaded.

Nothing that the Grand Jurors accused the petitioner of doing comes within the purview or scope of any activities for which any person should have registered, or any activities which any person would have been licensed to carry on had he registered, or in the language of the Act of 1917, any activities of which any person should have given "prior notification to the Secretary of State".

The Act of 1917, *the official citation of which is Title VIII, 40 Stat. 226,* was entitled "DISTURBANCE OF FOREIGN RELATIONS", and related largely to conflicts between a foreign government and the United States, whereas in July and September, 1941 we had not become involved in the war. This entire law was obviously designed to protect official representatives of foreign governments in the United States, and not to proscribe or limit the freedom of expression of persons in this country *when addressing arguments or propaganda to our general public.* Subsection 3 of this Act clearly relates to impersonating diplomatic or consular officials and the confusion which is caused if we take the United States Code Annotations without carefully analyzing the historical sequence thereof can readily be understood when we look at the Act of June 8, 1938, the Act of August 7, 1939 and the Act of April 29, 1942, which the Code annotators relate back to this subsection of the 1917 law—in spite of the fact that the declared *"policy and purpose"* of the later Acts is entirely different.

The Act of June 8, 1938, *the official citation of which is 52 Stat. 653,* was entitled "REGISTRATION OF CERTAIN PERSONS EMPLOYED BY AGENCIES TO DISSEMINATE PROPAGANDA". Under this law provision was made for a very elaborate and formal sequence of registration statements and periodic activity accounts which had no connection whatsoever with the activities of criminally-minded spies or persons impersonating diplomatic officials. These registration laws were designed to advise the public of the identity, associations and employment contacts of those who were speaking, writing or addressing to the American public arguments on behalf of some foreign nation. They applied to such persons as the Honorable John W. Davis, former Democratic candidate for President and distinguished New York lawyer, who registered thereunder as a British agent. They have nothing to do with either spies or persons falsely impersonating officials.

The Act of August 7, 1939, *the official citation of which is 53 Stat. 1244,* is an amendment of this propaganda registration Act of 1938, clarifying some of its provisions but continuing the same "policy and purpose" of disclosing the background of writers and speakers who were acting for disclosed foreign principals. It is noteworthy that the Act of June 8, 1938 was passed a year before the outbreak of the German-Polish or general European conflict, and the amendment under date of August 7, 1939 was passed a month before the outbreak of those hostilities.

More than four months after our entry into the war the Act of April 28, 1942 was adopted, *the official citation of which is 56 Stat. 248-256.* Although it purports to carry out the "policy and purpose" of the 1938 Act as amended, it is a much more voluminous and detailed bit of legislation, and whereas the section to which reference is made in the indictment as U. S. Code, Title 22, Section 233, is less than fifty words long, this 1942 Act is between 5,000 and 6,000 words in length, covers nine large pages in the official publications, and when printed separately constitutes a voluminous document.

The petitioner is a simple man of limited education and understanding. It is significant that whereas he pleaded guilty several months before the war to an elaborately phrased and ingeniously worded indictment, which he obviously could not understand, the fourteen-week trial of those indicted as alleged co-conspirators was not concluded until four days after Pearl Harbor, right at the height of the tension and excitement of that period, and he was not sentenced until January 2, 1942. The language of the warrant of commitment issued in his case reveals that the prosecutors or those who phrased the statements of the offenses for which the petitioner and others were sentenced were confusing the thinking and emotions of the European war era and reading into these peacetime statutes espionage undercurrents entirely foreign to their "policy and purpose".

POINT II

The basic purpose and principle of Section 233, in Chapter 5, concerning preservation of friendly foreign relations, is so utterly different from Section 601 and following sections, in the new Chapter 11, concerning foreign agents and propaganda, that regardless of the similarity of language between them, the first count of the indictment, to which Mr. Eichenlaub was persuaded to plead guilty, should now, in the light of all the circumstances, be vacated as void or so grossly misleading as to require that the Court set it aside.

Only a defendant whose constitutional rights had never been explained to him could have been persuaded to plead guilty to such a hybrid count, and it is respectfully submitted that this is one of those cases where the Court should look behind the plea, especially when the error is so obvious on the face of the indictment.

The voluminous indictment in this case, with its 19-page first count and 12-page almost equally incoherent second count, is defective in so far as it endeavors to charge a crime, both because it was carelessly prepared and because the evidence offered to support the charge, could only offend our own public and administration, if indeed it was criminally offensive at all.

The error in basing the charge on the altered and transferred Section 233 is one which goes right to the heart of the alleged offense and not merely one which may be corrected by tracing or analyzing the history of the law.

Title 22 of the United States Code, unlike Titles 1, 3, 4, 6, 9, 17, 26, and presently 18 and 28, is not an "official" codification, and whoever drafted the indictment ought to have checked his facts, and once he found a paragraph or series of paragraphs to suit his plans he should have quoted them in order to fairly inform the accused of the charge being made against him. Even if the statute relied upon were quoted in full, a better-expressed indictment could have been presented in half the number of pages which were used for the repetitious, alias-studded arrangement of formal phrases which were coherent only to someone who is initiated in the secondary meanings of certain statutory phrases and that double-talk jargon which courts have so often emphasized was designed apparently to confuse rather than to inform any layman or juror and most lawyers.

That the indictment is the work of a prosecutor and grand jury which were hopelessly confused as to the meaning they tried to express by stringing together copybook phrases is perfectly evident inasmuch as it would be impossible to violate Section 233 of Title 22 of the United States Code "in the manner and means set forth", either in the indictment or at the trial.

Since the indictment sought to charge espionage, certainly some *spy* statute should have been used rather than the Don't Disturb Diplomats Act or the Be Honest About Your Propaganda Backgrounds Act.

In 1917 Congress passed twelve separate, distinct and independent Acts (40 Stat. 231). The second of these twelve Acts related to proclaiming national emergencies; the fifth to enforcing neutrality, and the eleventh to search warrants. In addition to these three affirmative Acts, the nine other negative Acts related to such diverse subjects as I. Espionage, III. Injuring Trade, IV. Resorts to Violence, VI. Seizing Munitions, VII. War Embargoes, VIII. Disturbing Diplomats, IX. Passports, X. Counterfeiting, XI. Misuse of the Mails.

In 1938 (52 Stat. 63) Congress decided that propagandists should tell their neighbors who the foreign principals were for whom they were working, but just why the printers ever regarded this as something to be attached to the Don't Disturb Diplomats Act it is now impossible to discover.

In 1939 the law designated 53 Stat. 1244 was passed while we were still in the pre-war era of appeasement. Congress improved these new Be-Honest-About-Your-Retainer regulations, but obviously these amendments were not aimed at people who were Disturbing-Diplomats or were engaged in operating as spies or in counter-espionage activities.

In 1940, during the "phony peace" or "sleeping war" periods, Congress increased the peacetime punishment for a widely assorted set of acts (see 54 Stat. 78-80).

Finally, in 1942, Congress enacted the Foreign Agents Registration Act, 56 Stat. 248, 256, further elaborating the 1938 purposes and principles, but these new provisions show even more clearly the basic distinction between their purpose and that of the 1917 Act concerning diplomats and consular agents.

The accused, advised by an attorney inexperienced in criminal procedure and even more uninformed as to ideological issues and freedom of expression and association than those who drafted the indictment, was persuaded to believe that serving food and drink to customers whom the FBI was trailing was in violation of some registration

statute, and so he pleaded guilty, not to any act of espionage, but to the non-registration charge, which he was assured, and correctly so, was then a relatively minor statutory violation.

The trial of those who refused to take the indictment seriously dragged on into the Pearl Harbor period, and phrases and clauses which this petitioner, Mr. Eichenlaub, either never read or could not have understood the latent meanings of, were used to build up the case in the minds of the press and the public, as well as of the trial jury, as a spy case, thereby cutting clear away from the old Section 233 and going indeed far beyond the new Section 601 into matters of espionage, sabotage and other related charges, all of which subsequently affected the treatment this petitioner received. The sentence, the commitment, the subsequent detention of, and control exercised over, the petitioner have all been improperly affected by the unfair and unwarranted espionage and spy innuendoes and charges levelled against him.

POINT III

Even prior to the rule of the *Heine* case the petitioner's plea to the first count of the July, 1941 indictment clearly did not imply guilt of espionage, for acts against this nation's official guests (diplomats, consuls, etc.) however rude or prohibited are entirely distinct from spying.

Although the petitioner was persuaded to plead guilty, the nature of the offense which he committed and whether it makes him an undesirable resident within the meaning of the Act of 1920 cannot be fairly determined without regard for the decision of the Circuit Court of Appeals on the appeal of one of his co-defendants (*U. S.* v. *Heine*, 151 F. (2d) 813), which in effect pulls the props from under the indictment.

The theory of the prosecution both in presenting the case to the Grand Jurors and to the Trial Jurors was that it was unlawful to send abroad information which it was lawful to broadcast and distribute throughout this country.

The trial jury, which deliberated at one of the most hysterical periods of our history, when the President had just proclaimed an emergency and the imminent danger of a foreign invasion, or predatory incursion, accepted this theory of the prosecution, and it was not until November 8, 1945 that in the well-reasoned *Heine* case opinion by the Honorable Learned Hand of the Circuit Court of Appeals, Second Circuit, the fallacy of the basic premise of the prosecution was announced. This rule of the *Heine* case reversed the second and main count of the indictment, stating that "whatever was lawful to broadcast throughout the United States was lawful to send abroad" and warned (with respect to the section of the law under which this petitioner and the other defendants were indicted) that "so drastic a repression of the free exchange of information, it is wise carefully to scrutinize, lest extravagant and absurd consequences result."

The Circuit Court was convinced from the evidence that Mr. Heine had been an employed agent for foreign principals, and should have registered and kept the State Department advised of his activities, but it also pointed out that his course was surreptitiously adopted in order to escape detection and that he misled his correspondents as to his motives.

It is respectfully submitted, therefore, that under the rule of the *Heine* case, both as to his guilt on the lesser count and as to his innocence on the more serious count, this petitioner Eichenlaub should be cleared of any shadow of criminal guilt, since all he was accused of doing was to associate as a restaurateur with customers whose activities were entirely lawful, or unlawful only in the fact that they were not disclosed either to the Secretary of State or to such casual acquaintances as the proprietors of the restaurants they frequented.

Mr. Eichenlaub has served his sentence which the Trial Judge fixed at a relatively short period, and the idea that there is a continuing after-effect bringing him within the group of criminally undesirable residents is repugnant not only to the law as it now appears, but to the sense of proportion which the Court had in mind in imposing some short and some long sentences in that case.

The petitioner expected, when he pleaded guilty, that he would receive a suspended sentence and, if it is recalled that the plea was taken during an era of peace, when this country was not at war, there is no reason to suspect that the attorney who advised him was then unduly optimistic in encouraging this expectation. Although his plea was entered early in September, 1941, the sentence with respect to all of the accused—those who pleaded guilty and those who stood trial—was not imposed until after the termination of the trial. The events at Pearl Harbor occurred just prior to the conviction of the fourteen co-indictees who stood trial and whom the jury found guilty on December 12, 1941. Thereafter both those who pleaded guilty and those who were deemed guilty by the jury were sentenced on January 2, 1942.

Now that the heat of the war hysteria has passed and the well-reasoned rule of the *Heine* appeal prevails, it is crystal clear that this petitioner was never charged with anything amounting to a crime, and that he is detained only because his poverty prevented him from the timely retainer of counsel to prepare and present an appeal record for informed review by the higher courts.

POINT IV

The judgment of denaturalization is void for the reason that Section 738 of Title 8, U. S. C., does not provide for the revocation of naturalization by consent.

The petitioner, Richard Eichenlaub, was lawfully admitted into the United States in February, 1930, and admitted to full citizenship on November 17, 1936. This country was his permanent domicile and chosen allegiance years before there were Nazis. Seven years after petitioner's final naturalization a proceeding was brought to cancel his citizenship on the ground that he had procured it by fraud, and on January 25, 1944, upon the consent of the petitioner, a judgment was entered in the United States District Court for the Southern District of New York without his appearing before the Court or any judicial injury being had. The petitioner has made a direct attack upon the validity of this judgment of denaturalization in the same Court, but that motion has been denied. An appeal from the District Court's decision has been taken to the Circuit Court of Appeals for the Second Circuit and is now pending.

Section 738 of Title 8, U. S. C., which may be referred to as the revocation statute, provides:

> "(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

"(e) When a person shall be convicted under this Act of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication."

Subsections (a) and (e) of Section 738 plainly speak of a trial and conviction but in the instant case there was no trial. It was brought at the height of the war and before the protective decision of *Baumgartner* v. *United States*, 322 U. S. 665, requiring clear proof in such cases. The petitioner was persuaded, or in effect forced, to consent to cancellation of his naturalization, rather than contest the proposed allegations of the Government's complaint. Neither Section 738 nor any other section provides for the entry of such a consent decree.

The wisdom of limitations in denaturalization cases is aptly demonstrated in the case of *United States* v. *Jackson* (D. C., Mich., 1944), 55 F. Supp. 517, where the Court said that such a suit, though not a "criminal proceeding" is not an ordinary "civil action" since it involves an important adjudication of *status*, and, hence, the Government should be limited, as in a criminal proceeding, to matters charged in the complaint.

And in the case of *United States* v. *Wezel* (D. C., Ill., 1943), 49 F. Supp. 16, it was held that an action to set aside citizenship is an "action in equity", but the defendant is entitled to the rule of law which requires that a man shall be proved guilty beyond a reasonable doubt before he should be so found.

POINT V

The judgment of denaturalization is void for the reason that said judgment does not comply with the Rules of Civil Procedure.

Rule 55 of the Federal Rules of Civil Procedure provides as follows:

> "Subsection (b). Judgment by default may be entered as follows:
>
> (1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.
>
> (2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States."

A cancellation proceeding is equitable in character, and it was necessary according to the Rule to establish in the instant case the truth of any averment by evidence in order to enable the Court to enter judgment or to carry it into effect.

This proceeding was based upon fraud and the fraud must be proved before judgment is entered. In the instant case no proof was offered and no evidence was presented to the Court before the judgment was entered.

In the case of *United States* v. *Polzin*, 48 F. Supp. 476, the Court, on page 480, said:

> "However, we have no right to cancel citizenship upon mere speculation. *There must be satisfgctory proof of fraud or illegality at the time citizenship was granted, because, as the statute now reads, it is only in such instances that citizenship can be taken away.*"

In the case of *United States* v. *Bergman*, 144 F. (2d) 34, the Circuit Court held that citizenship once granted should not be revoked except on "positive proof of fraud". Allowance should be made if statements were made in the heat of passion or partisan debate.

In the case of *United States* v. *Heymig*, 50 F. Supp. 566, a denaturalization proceeding, the Court, on page 567, stated:

> "From these excerpts from decisions in other Federal courts it seems clear that the rule not only should be, but is, that evidence of fraud must be clear and convincing to a degree that it satisfies the mind of the court of the truth of the charges, *beyond a reasonable doubt.*"

POINT VI

A proceeding to cancel a certificate on the ground of fraud is a suit in equity and the burden of proof is on the prosecution to establish and prove its case.

A court order or judgment is presumed to be valid. There is, therefore, a presumption of validity of an order admitting a person to citizenship. All courts seem to agree upon the fact that the burden of proof is upon the prosecution to sustain its charges that the order and certificate were fraudulently or illegally procured.

In the case of *United States* v. *Fischer* (D. C., Fla., 1942), 48 F. Supp. 7, it was held that a suit for cancellation of a certificate of citizenship fraudulently or illegally procured is a statutory proceeding in which resort is had to general principles of equity.

In the case of *United States* v. *Sharrock*, 276 Fed. 30, which was an action to revoke and set aside an order and cancel the defendant's certificate of citizenship, the Court, in the opinion, says:

> "To deprive a man of his priceless possession of an inestimable right to American citizenship, there must be full proof. Nothing will warrant cancellation of citizenship but clear, unequivocal and convincing evidence that in quantity and quality inspires confidence and produces conviction of the truth of the charge virtually beyond reasonable doubt."

In the case of *United States* v. *Rovin*, 12 F. (2d) 942, the Court, in its opinion, announced that the burden is upon the Government to prove fraud by preponderance of the evidence. Fraud is not to be lightly inferred, but must be established by clear and convincing evidence.

In another case, *United States* v. *Ebell*, 44 F. Supp. 43, the Court held that an order of naturalization is not to be lightly set aside unless it is clearly shown by a preponder-

ance of completest evidence that the order and certificate had been secured by fraud.

In *United States* v. *Der Manelian*, 39 F. Supp. 959, to set aside the order and cancel the certificate of citizenship it was held that the burden was upon the prosecution to prove fraud *by a preponderance* of the evidence.

In *United States* v. *Hartman* (D. C., Pa., 1943), 51 F. Supp. 394, it was held that citizenship once conferred should not be taken away without the clearest justification and proof.

Since a cancellation proceeding is equitable in character, and not criminal, the same rules as to burden of proof and weight of evidence apply, as in actions generally to revoke and set aside a judgment.

POINT VII

In a proceeding to cancel a certificate of naturalization on the ground of fraud the Government must present evidence of a clear, unequivocal and convincing nature.

In the case of *Schneiderman* v. *United States*, 320 U. S. 118, which was an action to cancel a certificate of citizenship on the ground that it was fraudulently procured, it was held that the burden of proof must be met with evidence of a clear and convincing character in accordance with strict legal requirements.

In the case of *United States* v. *Schuchardt* (D. C., Ind., 1943), 49 F. Supp. 567, which was an action to revoke an order admitting defendant to citizenship and to cancel a certificate of naturalization on the ground of fraud, that Court also held that the Government must prove fraud by clear and satisfactory proof.

Similarly, in the case of *United States* v. *Orth* (D. C., S. C., 1943), 51 F. Supp. 683 (reversed on other grounds), the Court held that the Government had the burden of

proving its essential allegations by clear, unequivocal and convincing evidence. And in the case of *United States* v. *Scheurer* (D. C., Ore., 1944), 55 F. Supp. 243, it was held that to set aside a naturalization proof must be full, clear and convincing.

In *Baumgartner* v. *United States* (1944), 64 Sup. Ct. 1240, it was held that the statutory proceeding for naturalization was designed to afford cumulative protection against fraudulent or illegal naturalization, but relaxation in the vigor appropriate for scrutinizing intensity of allegiance to the United States embraced by an applicant before admitting him to citizenship is not to be corrected by meager standards questioning such allegiance retroactively.

In *Bergman* v. *United States*, 144 F. (2d) 34, *supra*, it was said:

> "We cannot escape the conviction that the case made out by the Government lacks that solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen."

In the instant case the failure of the Government to present evidence of a clear, unequivocal and convincing nature that petitioner fraudulently procured his naturalization certificate is patent.

POINT VIII

The Court lacked jurisdiction to enter a judgment of denaturalization.

Neither New York State laws nor any rule or statute of the United States delegates jurisdiction to the Courts to enter a judgment by consent upon a claim arising out of tort or fraud.

In the case at bar the Court entered judgment as though on consent, but there cannot be any judgment by consent without a written admission of facts alleged in the complaint.

At best, therefore, the defendant consented to the entry of a void judgment.

It is a serious question whether the Congress ever intended that the safeguards thrown around the citizen by present laws and regulations might be waived by a so-called consent.

POINT IX

The petitioner's conviction was not the conviction of an alien within the meaning of the Act of 1920.

The Government contends that the rule of retroactivity of cancellation of citizenship operates in effect to make petitioner an alien at the time he was convicted in 1941 and thus brings him within the 1920 Act. It is submitted that the rule of retroactivity cancellation has never been and should not be applied in so extreme and harsh a manner. The reference by Congress in the 1920 Act to aliens certainly was not intended to include naturalized citizens who might subsequently have their naturalization cancelled, especially where, as here, the citizenship status was not only conceded in the non-registration as a propagandist associate proceedings but the jurors who convicted and the judge who sentenced heard the prosecutors stress and repeatedly emphasize such citizenship.

In *Delgadillo* v. *Carmichael* (Oct. Term, 1947, No. 63) the Supreme Court pointed out that it was a capricious application of immigration laws to hold that every technical "entry" of an alien into the United States was an entry within the meaning of the statutory provision permitting deportation for crimes committed prior to entry. *A fortiori*, it is a capricious application of the Act of 1920 to treat as a convicted-alien a convicted-citizen-subsequently-denaturalized.

POINT X

Under proper circumstances a judgment cancelling citizenship can be vacated and set aside, and time should not act as a barrier in the instant case.

In the recent case of *United States* v. *Geisler*, 9 F. R. S., 60 B. 51, involving a cancellation of defendant's certificate of citizenship, a period of almost four years had elapsed between the entry of a *consent* judgment and the application to set it aside, yet the judgment was set aside by the District Court.

In the case of *Rene de Meerle* v. *People of the State of Michigan*, Supreme Court Law Ed., Advance Opinions, Vol. 90, No. 7, P. 47, which was reversed, and the recent case of *Tony Marino* v. *Joseph E. Ragen*, reported in Vol. 92, No. 5, Supreme Court Law Ed., Advance Opinions, page 203, in which case the judgment below was vacated and the case remanded, a period of approximately fifteen years had elapsed before the first case was brought to this Court, and a period of twenty-two years had elapsed before the second case reached the Supreme Court, but both were reviewed and the convictions were held to have been in violation of those petitioners' constitutional rights.

It is respectfully contended that the instant case involves a similar abridgement of constitutional rights, and is therefore one that merits review by this Court.

There can be no doubt but that under proper circumstances a judgment cancelling citizenship can be vacated and set aside, and time should not act as a barrier in justifiable cases.

Again, too strong emphasis cannot be placed on the fact that the education of the relator is meager. His understanding of the English language itself is limited. He had been employed for ten months in defense work and his wife was working, and he insistently contends that he signed the consent believing that if he contested the case

the Government would regard him and his wife as recalcitrants and make a *permanent* court record of his denaturalization, whereas, if he consented, the effect would merely be a *suspension* of citizenship privileges for the duration of the war.

No claim is made that he was ever informed or advised of his constitutional rights or any possible interrelationship of what he was signing, with his right of domicile or deportability. Where under the stress and necessities of war conditions errors of officials and mistakes of individuals result in hardships on persons long domiciled here, the Government should be slow to afflict and quick to make retribution, neither reluctant nor evasive in correcting wrongs inflicted upon citizens, since a forthright recognition of injustice is the surest means of maintaining faith and confidence in our system of law. *Abo* v. *Clark*, 77 F. Supp. 806.

There is no question but that the war's hysteria affected even before Pearl Harbor the procedural and substantive rights of all persons prosecuted in so-called "criminal" or "civil" proceedings because of their sympathies for this or that foreign country or because of their associations and expressions of opinion on controversial domestic or foreign policies.

In the light of the numerous recent decisions reversing what some courts have not hesitated to call harshly arbitrary and capricious judgments and determinations, the petitioner should certainly be given time to fully present his case for review or to vacate the two war-ideology judgments against him, his "confession" of non-registration or associating with unregistered propagandists and his "consent" to surrender of citizenship.

As was so well stated in the majority opinion in *Madeiros* v. *Watkins*, 166 F. (2d) 897, at page 900, the strictest proof is required if the determination will result in severing one from his home, business and all present connections.

POINT XI

The warrant of deportation contains no lawful ground of deportation.

The warrant of deportation (R. 2) states that appellant is deportable in that he has been found to be a member of the undesirable classes of alien residents enumerated in "the" Act of 1920. But the Act requires that a finding be made not that the individual is a member of the undesirable classes but that a member of the described classes is individually an undesirable resident. In *Mahler* v. *Eby*, 264 U. S. 32, the Supreme Court of the United States decided this precise question and held that a new deportation hearing was required although this question was first raised in that Court.

The point that remanding this case is no mere formality is indicated by the facts which must be considered in making a specific finding that the appellant is an undesirable resident. The petitioner has a wife in this country. There is no indication that the petitioner at any time prior to, or at the time of taking the oath of allegiance to the United States, had been guilty of any act of disloyalty or hostility to this country. Nor is there any evidence or intimation, except for the so-called non-registration matter and this controversy of citizenship, that the petitioner has at any time run afoul of any Federal, State or Municipal authority.

The petitioner has been advised by counsel that he has meritorious grounds for moving to vacate both the non-registration propaganda conviction and the denaturalization judgment, but even if both remain records of the Court, the proposition that he is a German or an undesirable alien, subject to deportation, is completely unsupportable in law and contrary to clearly established and sound precedents. Whether or not Mr. Eichenlaub succeeds in regaining his citizenship status, he is definitely not a German,

although on the basis of the present record he seems to be a stateless man without a national sponsor. In *In re Steinworth*, 159 F. (2d) 50, the Court held that German citizenship is not restored by cancelling Costa Rican naturalization.

Before this issue of Right of Domicile and Citizenship status can be determined, judicial review or trial should be had for the reasons so well expressed in Judge Frank's dissenting opinion in *Madeiros* v. *Watkins*, 166 F. (2d) 897, at pages 900-904.

As Judge Goodman pointed out in his first opinion in *Abo* v. *Clark* (that of June 30, 1947, 76 F. Supp. 664 at 667), an "expatriation" proceeding at most only terminates rights of American citizenship and "in no way fixes or determines any particular alien nationality for the expatriate". The clarity of Judge Goodman's decision probably stems from the fact that he calls things by their real names and "expatriation" is not confused with "repatriation".

Until recently no Attorney General had ever claimed that the 1798 Act was an authority to "punish" individuals without trial, and if hardship to an individual resulted from "protecting" the public, the injury was certainly no greater than drafting men for military service. Since, however, the recent policy of "transplanting" civilians long domiciled here *into* slave camps in foreign war zones under pretext of "removing" them *from* the United States, an entirely different series of questions arise. The duty of care a federal detainer has is not discharged by forcibly releasing his charges in danger beset or army occupied areas and if Sections 428, 443, 446 of Title 18, U. S. C., mean anything, such transporting into the jurisdiction of peon oppression governments is most unlawful.

In reviewing the law applicable to the facts of this case, and the cases of those similarly situated (for the sufficiency of the indictment referred to above affects a number of other persons and will be judged by the ultimate

ruling herein), it is evident (1) that the petitioner did not commit the crime of which he had pleaded guilty; (2) that the judgment of denaturalization was a nullity because the petitioner was denied his constitutional rights; (3) that except as noted above, the petitioner during the past eighteen years of his residence in this country has not run afoul police authorities; and (4) that deportation would result in "serious economic detriment" to his wife and would work irreparable hardship upon him, entirely out of proportion to any offense he may have unwittingly committed, as has hereinbefore been stated.

For the foregoing reasons we respectfully and sincerely urge that the writ of certiorari should issue.

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APPENDIX I

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 254—October Term, 1947.

(Argued April 14, 1948 Decided May 3, 1948.)

Docket No. 20965

UNITED STATES OF AMERICA, *ex rel.*
RICHARD EICHENLAUB,
Relator-Appellant,

—v.—

W. FRANK WATKINS, as District Director of Immigration and Naturalization, etc.,
Respondent-Appellee.

Before:

SWAN, CLARK and FRANK,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York dismissing a writ of habeas corpus. Affirmed.

HAROLD K. MCKEE, *for appellant;*

JOHN F. X. MCGOHEY, *United States Attorney for the Southern District of New York* (John F. Ryan, of counsel) *for appellee.*

Eichenlaub, the relator, entered the United States in 1930 and was naturalized in 1936. In 1941, he was convicted of the crime of having conspired to act as an agent for a foreign government without having registered. The indictment referred to 22 U. S. C. A. §233. By the Act of March 28, 1940, §233 had been amended so as to increase the penalty;[1] it now appears as 22 U. S. C. A. §601. The Act of May 10, 1920,[2] provides in part: "* * * That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917, entitled 'An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States,' if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States, to wit: * * * (2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts, the judgment on such conviction having become final, namely: (a) An Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917, or the amendment thereof approved May 16, 1918; * * *" On January 25, 1944, in denaturalization proceedings in the district court for the Southern District of New York, a decree was entered which cancelled relator's certificate of naturalization. Subsequently, administrative

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[1] 54 Stat. 80.

[2] 41 Stat. 593, 594. Under the authority of 1940 Reorg. Plan No. V, 54 Stat. 1238, "Attorney General" is substituted for "Secretary of Labor." The Act is codified in 8 U. S. C. §157; the words of the statute are, of course, controlling.

deportation proceedings were begun against him. He was arrested and given an administrative hearing. In those proceedings, a finding was made that he "is an undesirable resident of the United States." On October 9, 1945, a warrant of deportation was issued which stated in part the following: "Whereas, after due hearing * * * an order has been duly made that the alien Richard Eichenlaub * * * is subject to deportation under the following provisions of the laws of the United States, to wit: The Act approved May 10, 1920, in that he has been found to be a member of the undesirable classes of alien residents enumerated in said Act, to wit, an alien who since August 1, 1914 has been convicted of conspiracy (18 U. S. C. 88) to violate an Act entitled 'An Act to punish acts of interference with the foreign relations * * *' approved June 15, 1917 (22 U. S. C. 233)." Relator brought habeas corpus proceedings. From an order dismissing the writ he appeals.

FRANK, *Circuit Judge*.

Relator contends that 22 U. S. C. A. §233 was repealed and that therefore he was not convicted of any crime enumerated in 8 U. S. C. A. §157. We cannot agree; the 1940 Act did not repeal but merely increased the penalty prescribed in 22 U. S. C. A. §233.[3] Nor do we agree with his contention that 8 U. S. C. A. §157 does not include one who was a citizen when convicted but who is subsequently denaturalized. We think the decree of denaturalization relates back, at least for this purpose. Cf. *Rosenberg* v. *United States*, 60 F. (2d) 475 (C. C. A. 3).

---

[3] If he means to contend that the indictment was insufficient, the contention is frivolous. As the court in the criminal suit had jurisdiction of both his person and the subject matter, he cannot, in a habeas corpus proceedings, attack the conviction.

He also urges that the deportation warrant is defective, as not in accord with 8 U. S. C. A. §157, since it states that he is "a member of the undesirable classes of alien residents enumerated in said Act" and does not state that he, as an individual, has been found to be an "undesirable resident." He cites *Mahler* v. *Eby*, 264 U. S. 32. But there the Court said (p. 43) that the defect in the warrants had not been met by other matter in the record. Here we have an explicit finding in the administrative proceedings that relator "is an undesirable resident." It would serve no useful purpose to remand to permit amendment of the warrant to conform to that finding.

Affirmed.

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Supreme Court of the United States

October Term, 1949

No. 3

THE UNITED STATES OF AMERICA, *ex rel*,
RICHARD EICHENLAUB,

Petitioner,

against

EDWARD J. SHAUGNESSY, as Acting District Director of Immigration and Naturalization of the United States for the District of New York, or such person, if any, as may have the said RICHARD EICHENLAUB in custody.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Supreme Court of the United States

October Term, 1949

No. 3

THE UNITED STATES OF AMERICA, *ex rel*, RICHARD EICHENLAUB,

Petitioner,

against

EDWARD J. SHAUGNESSY, as Acting District Director of Immigration and Naturalization of the United States for the District of New York, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 12) is reported at 167 F. 2d 659. The opinion of the District Court is not reported (R. 8-9).

Jurisdiction

The judgment of the Court of Appeals was entered May 3, 1948 (R. 15). The time for filing the petition for a writ of certiorari was extended by order dated July 30, 1948, of Chief Justice Vinson to and including September 3, 1948 (R. 16). Application for certiorari was made on September 2, 1948, and was allowed on June 27, 1949 (R. 17). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and 2101 (c).

Questions Presented

Whether the warrant for petitioner's deportation is not invalid on any of the following grounds:

1. The special deportation statute here involved, Act of May 10, 1920, does not extend to the offenses referred to in in the first count of the indictment to which petitioner pleaded guilty.

2. Petitioner's conviction was not the conviction of an alien within the meaning of the Act of 1920.

3. The warrant of deportation contains no lawful ground of deportation.

Statutes Involved

The Act of June 15, 1917, c. 30, Title VIII, 40 Stat. 226, provides in part (22 U. S. C. 233):

> "Sec. 3.—Whoever, other than a diplomatic or consular officer or attache, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be fined not more than $5,000, or imprisoned not more than five years, or both."

The Act of March 28, 1940, c. 72, 54 Stat. 80, provides in part (22 U. S. C. 601):

> "Sec. 6—Whoever, other than a diplomatic or consular officer or attache, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be

punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $5,000."

The Act of May 10, 1920, c. 174, 41 State. 593, provides in part (8 U. S. C. 157):

"Aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, upon the warrant of the Attorney General, be taken into his custody and deported in the manner provided in sections 155 and 156 of this title, if the Attorney General, after hearing, finds that such aliens are undesirable residents of the United States, to wit:

(1) All aliens who since August 1, 1914 have been or may hereafter be convicted of any violation or conspiracy to violate any of the following sections, the judgment on such conviction having become final, namely:

(a) Sections 25, 27, 21-29, 98, 130-133, 288, 343-346, 349, 381, 502, 535, 536, 475, 611-633 of Title 18, Sections 213, 220-222, 231-233, 234, 235, 238-245 of Title 2, and Sections 31-4, 191-194 of Title 50."

Statement of Facts

The petitioner was lawfully admitted into the United States on February 23, 1930, and became a citizen thereof by naturalization on November 17, 1936 (R. 3). He is married and his wife is a resident of the City and State of New York. For approximately twelve years after taking up residence in the United States, he was continuously employed and there is no indication that at any time during this period did he run afoul of federal, state or municipal

authorities. Nor is there any indication of any word or deed by petitioner which can be construed as hostile to the United States prior to or at the time of his naturalization. He is a simple man of limited education and understanding.

On January 2, 1942, the petitioner was sentenced in the United States District Court for the Eastern District of New York to a term of imprisonment for eighteen months following his plea of guilty to one of two counts of an indictment charging him with having conspired to act as an agent for a foreign government without being registered and as such agent, to accumulate information for transmittal to a foreign government, in violation of Section 88, Title 18, U. S. C. (R. 4).

Upon the expiration of his sentence, the petitioner's certificate of naturalization was cancelled in the United States District Court for the Southern District of New York by a decree entered January 25, 1944, wherein reference was made to a "consent and waiver" by petitioner to such cancellation. On April 19, 1944, a warrant for the arrest of the petitioner was issued and he has since that time been held in the custody of respondent (R. 1-2). Thereafter deportation proceedings were instituted against petitioner and an order was made therein recommending that he be deported to Germany (R. 4). An appeal therefrom was taken to the Board of Immigration Appeals, which upheld the recommendation that the petitioner be deported on the following charge:

> "The Act approved May 10, 1920, in that, he has been found to be a member of the undesirable classes of alien residents enumerated in Section 1 of said Act, to wit: An alien who since August 1, 1914, has been convicted of conspiracy (18 U. S. C. 88) to violate a part of an act entitled 'An Act to punish acts of interference with the foreign relations, the

neutrality and the foreign commerce of the United States, to punish espionage, and better, to enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917 (22 U. S. C. 233)."

A warrant of deportation was issued on October 9, 1945, directing that the petitioner be deported to Germany (R. 1-2).

The petitioner thereupon applied for a writ of habeas corpus on the ground that the warrant of deportation was based on an erroneous construction of Section 157 of Title 8, U. S. C., the deporting statute, in that said statute does not provide for the deportation of petitioner and that the petitioner is therefore illegally detained, imprisoned and restrained of his liberty.

The writ was granted and a return was filed thereto. Argument was heard thereon, but the writ was dismissed (R. 8-9). On appeal (R. 10-11) the Court of Appeals for the Second Circuit affirmed the order of the District Court (R. 12-14).

Although petitioner was at large, engaged in defense work, and completely free from restraint after his discharge from prison on April 15, 1943, following the service of his sentence at Milan, Michigan, to April 19, 1944, a period of over twelve months, during which the war between the United States and Germany was being waged relentlessly, it is significant that the petitioner was not considered so dangerous in the opinion of the United States Attorney for this District and his subordinates as to move them to detain petitioner as a person dangerous to the security of the nation. Following the denaturalization of petitioner and for a period of almost four months thereafter, the Attorney General of the United States failed to bring about his in-

ternment as a dangerous enemy alien, as was done in the case of numerous aliens placed in detention camps in various parts of the country, as a security measure.

The respondent's return to the writ of habeas corpus herein (R. 6:8) sought to attribute to the petitioner Eichenlaub (the owner of a restaurant frequented by one or two customers later found to be trained undercover operators for the Reich) some guilty knowledge of violation of several penal statutes with which he was in nowise connected and to which he did not plead guilty.

The petitioner pleaded guilty to the first count only of the indictment, which charged a conspiracy under U. S. C., Title 18, Section 88, (R 2), and an overt act involving him in the alleged system and organization operated in the United States for the purposes of obtaining, collecting and receiving information of a military, naval, commercial or industrial nature, and data concerning the movement and description of cargo ships of American foreign registry. The said overt act consisted of a conference he had with an individual named Eberling on June 10, 1941, within a month of the time when he was indicted and several months prior to the commencement of the war between the United States and Germany.

The petitioner, who had no criminal record prior to the conviction on a plea of guilty to the above count, which was the lesser of the two counts in the indictment, had as the only alternative the matter of standing trial with thirty-two other defendants, some of whom were alleged to be in communication with the enemy by radio, on a sweeping conspiracy charge of espionage. Subsequent developments at that trial served to reveal how some of the defendants, notably the petitioner, were innocent sources of information used by trained and clever undercover agents operating in this country as mediums for procuring isolated data

later assembled by ingenious methods to convey intelligence to foreign central intelligence headquarters.

The said conspiracy charge was well analyzed by the Circuit Court of Appeals for the Second Circuit in an opinion written on November 8, 1945, upon an appeal taken by one of the thirty-three defendants who stood trial and was convicted and sentenced after Mr. Eichenlaub's plea, at which time the Court discussed at considerable length the very underhanded and surreptitious devices to which that appellant, one Heine, resorted to deceive and conceal from those with whom he associated or from whom he obtained information his real intentions and purposes. See *United States* v. *Heine*, 151 F. (2d) 813.

While it is clear that the conviction of petitioner may not be attacked in this proceeding, it is nevertheless true that the attribution of "undesirability", "deportability", "moral turpitude" or any felonious purposes to the petitioner on the basis of his plea to a statutory conspiracy charge on which he received the lightest sentence imposed on any of his co-defendants, smacks of the hysteria of those first Pearl Harbor days during which the jury, who tried most of those indicted with him, was moved to declare all of the defendants before them guilty of everything charged, and disregard the same judicial standards which the appellate courts have since laid down.

Assignment of Errors

The Circuit Court of Appeals erred:

1. In holding that the special deportation statute here involved, Act of May 10, 1920, extends to offenses under Section 3 of Title VIII of the Act of June 15, 1917, as affected by Section 6 of the Act of March 28, 1940.

2. In holding that petitioner's conviction of conspiracy to violate 22 U. S. C. A. 233 before his denaturalization, had the same force and effect as the conviction of an alien for the violation of that statute, under the Act of 1920.

3. In holding that the warrant of deportation was sufficient in law and contained lawful ground for the deportation of petitioner.

4. In affirming the order dismissing the writ of habeas corpus.

POINT I

The special deportation statute here involved, Act of May 10, 1920, does not extend to offenses under Section 3 of Title VIII of the Act of June 15, 1917, as affected by Section 6 of the Act of March 28, 1940.

The 1920 Act provided that a person convicted of a conspiracy to violate the 1917 Act could be deported if found to be an undesirable resident of the United States. This special deportation statute went further than the general statutory deportation provisions which provided deportation for conviction of one crime involving moral turpitude committed within five years after entry, or two such convictions at any time after entry, and provided an extremely stringent rule for the special deportation of aliens already convicted before the 1920 Act was passed and for aliens who at any time in the future, without limitation, might be convicted of one such offense.

It may be true that deportation under this 1920 Act is not double jeopardy or punishment for crime in the technical sense permitting the alien to invoke constitutional protections against double jeopardy or ex post facto laws

of punishing him for offenses already committed. *U. S. ex rel Bilokumsky* v. *Tod*, 263 U. S. 149; *Mahler* v. *Eby*, 264 U. S. 32; *United States* v. *Commissioner*, 5F. (2d) 162 (C. C. A. 2); *Sichotsky* v. *United States*, 277 Fed. 762 (C. C. A. 9). On the other hand it is recognized that even deportation under the general statutes, and *a fortiori* in this case, is a most severe hardship on the individual.

In *United States* v. *Bridges*, 326 U. S. 135, the Court said:

> "Here the liberty of an individual is at stake. * * * We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised less the procedure by which he is deprived of that liberty does not meet the essential standards of fairness."

The 1920 Act, although not penal for purposes of certain particular constitutional protections, is subject to the same rule of statutory construction as penal statutes and should not be extended by implication.

The Act of 1920 enumerates the statutes, convictions under which may supply the basis for this special deportation. It is evident that convictions under similar statutes adopted after World War II, could not be the basis for deportation under the Act of 1920. Equally, the Act of 1920 should not be construed as applying to a conviction under the Act of 1940, materially changing the Act of 1917. The Act of 1940 increases the punishment for the offenses defined in Sec. 3 of Section VIII of the Act of 1917 from imprisonment up to five years or a fine of not more than $5,000, or both,

to a mandatory sentence of not more than ten years and, in addition, a permissive fine of not more than $5,000. Under the 1940 Act, unlike the 1917 Act, the Court is required to give a jail sentence. Since the Congress increased the punishment for these offenses it is not to be inferred, in the absence of the most compelling reasons, that Congress also intended to make a convicted person subject not only to the increased penalties, but also to the deportation applicable to the 1917 Act. It is submitted that in the absence of the plainly expressed intent that this result was to follow, the 1920 Act should not be construed as applying to offenses under the 1917 Act as changed by the 1940 Act.

There is ample authority for the foregoing proposition. In the case of *Norriss* v. *Crocker*, 13 How. 429, the defendants were sued in an action of debt to recover the penalty of $500 upon the fourth section of the Act of Congress of February, 1793 (1 Stat. at L. 302), respecting fugitives from justice and persons escaping from the service of their masters. That section provided that any person who should knowingly and unwillingly obstruct or hinder the claimant, his agent or attorney, in seizing or arresting the fugitive of labor * * * should forfeit and pay for each of the offenses the sum of $500.

While the action brought under this section against the defendant was pending, Congress in 1850 (9 Stat. at L. 462) passed an act which embraced the offenses specified in the Act of 1793, and created new offenses and affixed to each a different punishment from that named in the old act, prescribing a fine not exceeding £1,000 and imprisonment not exceeding six months. The Act of 1850 contained no clause repealing in specific terms the Act of 1793.

The Court held, Mr. Justice Catron delivering the opinion, that the last act was plainly repugnant to the first, and observed that as a general rule it was "Not open to controversy, that when a new statute covers the whole sub-

ject of an old one, adds offenses and prescribes different penalties for those enumerated in the old law, the former statute is repealed by implication, as the provisions of both cannot stand together."

When repugnant provisions such as the foregoing exist between two statutes, the second is held according to all authority to operate as a repeal of the first, for the later statute expresses the will of Congress as to the manner in which the offense shall be subsequently regarded.

It is true in the instant case that Section 601 does not expressly repeal Section 233 and repeals by implication are not generally looked upon with favor. Where we have two acts dealing with the same subject, it is concededly desirable to give effect to both if possible. But, if two statutes are repugnant in any of their provisions, the later statute, though it contains no repealing clause, operates as a repeal of the first. Moreover, even where the two statutes involved are not in express terms repugnant, if the later legislative act covers all of the subject matter embodied in the first, and embraces new provisions indicating that it was intended as a substitute for the first act, the second statute will operate as a repeal of the first statute. *Davies* v. *Fairbairn*, 3 How. 636; *Bartlett* v. *King*, 12 Mass. 537; *Com.* v. *Cooley*, 10 Pick. 37; *Pierpont* v. *Crouch*, 10 Cal. 315; *Norriss* v. *Crocker*, 13 How. 429; *Sedg. Stat. Law* 126.

Furthermore, even if Section 601 was only amendatory as the Courts below intimated, nevertheless, an amending act or statute may also operate as a repeal. *People* v. *Zito*, 237 Ill. 434, 82 N. E. 1041; *Goodno* v. *City of Oshkosh*, 31 Wis. 127.

This is particularly true where the provisions of the two statutes are in irreconcilable conflict. *McDowell* v. *Fuller*, 169 Mich. 332, 135 N. W. 265; *Jacobus* v. *Meskill*,

56 N. J. L. 255; *People* v. *Angle*, 109 N. Y. 564, 17 N. E. 413.

It is equally true where the amendment is intended as a substitute for existing law. *Lowe* v. *Bourbon County*, 5 Kan. Ap. 603, Pac. 579; *Vanderveer* v. *Herbert*, 76 N. J. L. 173, 68 Atl. 909; *Taylor* v. *Stase*, 87 Tex. Ar. 3300, 221 S. W. 611.

The Courts below seem to suggest in their opinions that although the petitioner was convicted on September 4, 1941 (on a guilty plea to the first count of an indictment filed in July 1941) over a year after enactment of the Act of 1940, the present legal question may be avoided by assuming the petitioner was convicted under the 1917 Act without reference to the 1940 Act. It is submitted that this suggestion appears to be based upon the reference in the indictment to 22 U. S. C. Sec. 233, the original United States Code reference for Section 3 of the 1917 Act. After enactment of the 1940 Act, Section 3 of the 1917 Act, as amended by Section 6 of the 1940 Act, appears in the United States Code as 22 U. S. C. Section 601. It is submitted that this suggestion of the courts below that conviction rested on the 1917 Act apart from the 1940 Act (1) is unsound, and, in alternative (2), if accepted the conviction was invalid and no basis for deportation.

1. The Government certainly would not concede that reference in the indictment to Section 233 instead of Section 601 would bar it from invoking the increased penalties of the 1940 Act. Equally the Government may not here contend that conviction was under the 1917 Act alone. When the petitioner was indicted and convicted in 1941, the 1940 Act was part of the law and the appellant could not be convicted without relying on the 1940 Act.

2. If, in the alternative, the conviction was under the 1917 Act alone the conviction was invalid because the 1917

Act had ceased to exist except as it was a part of the 1940 Act. After enactment of the 1940 Act the Government could not proceed under the 1947 Act alone.[1] If the conviction was under the 1917 Act alone it was not a lawful conviction and was no basis for deportation. It is submitted, therefore, that the deportation act of 1920 does not extend to this offense under the subsequent 1940 Act in the absence of a clear showing that Congress so intended.

As further evidence that Congress did not intend that the deportation act of 1920 extend to the offense involved herein under the subsequent 1940 Act, the Court's attention is invited to a reading of the following sections of the act of 1920 (c. 174, 41 Stat. 593):

> "Aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, upon the warrant of the Attorney General, be taken into his custody and deported in the manner provided in sections 155 and 156 of this title, if the Attorney General, after hearing, finds that such aliens are undesirable residents of the United States, to wit:
>
> "(2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following acts or part of acts, the judgment on such conviction having become final, namely:
>
> "(a) An Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and partly to enforce the criminal laws of the United States, and for other pur-

[1]This situation of an amended act is, of course, different from a prosecution which may proceed under a repealed statute (1 U. S. Sec. 29).

poses,' approved June 15, 1917, *or the amendment thereof approved May* 16, 1918.

"(b) An Act entitled 'An Act to prohibit the manufacture, distribution, storage, use and possession in time of war of explosives, providing regulations for the safe manufacture, distribution, storage, use and possession of the same, and for other purposes,' approved October 6, 1917;

"(c) An Act entitled 'An Act to prevent in time of war departure from and entry into the United States contrary to the public safety,' approved May 22, 1918;

"(d) An Act entitled 'An Act to prevent the lawful injury or destruction of war material or of war premises or utilities used in connection with war material, and for other purposes,' approved April 20, 1918;

"(e) An Act entitled 'An Act to authorize the President to increase temporarily the military establishment of the United States,' approved May 18, 1917, *or any amendment thereof or supplement thereto;*

"(f) An Act entitled 'An Act to punish persons who make threats against the President of the United States,' approved February 14, 1917;

"(g) An Act entitled 'An Act to define, regulate and punish trading with the enemy, and for other purposes,' approved October 6, 1917, *or any amendment thereof.*"

It is significant that the language in subsections (e) and (g) above, expressly indicates that it was the intention of Congress that the Act of 1920 apply not only to the said

subdivisions in their then present forms, but to "*any amendment thereof or supplement thereto.*"

On the other hand, the complete absence of any similar language in subdivision (a) plainly reveals that it was not the intent of Congress that the act of 1920 extend to offenses committed under any amendments of section (a) of the said statute. It therefore follows that if subdivision (2) above was modified by Section 601 and the deporting statute lacks any reference to offenses committed in violation of the later section, the modified statute, the petitioner was not convicted of any offense for which he could be deported and no further proceedings can be had under subdivision (2) once that section was altered.

This principle is abundantly supported by numerous decisions of this Court. In *Yeaton* v. *United States*, 5 Cranch 281, 283, Chief Justice Marshall stated:

> "It has long been settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

In the case of *Maryland* v. *Baltimore & Ohio R. R. Co.*, 3 How. 534, 552, Chief Justice Taney stated:

> "There can be no legal conviction, unless the law creating the offense be at the time in existence. By the repeal, the legislative will is expressed that no further proceedings be had under the act repealed."

See also *Norriss* v. *Crocker*, 13 How. 429, 440; *Gulf, C. & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503, 506.

To the same effect is the case of *U. S.* v. *Chambers*, 291 U. S. 217, wherein Mr. Chief Justice Hughes stated:

> "This Court takes judicial notice of the fact that the ratification of the Twenty-first Amendment of the Constitution which repealed the Eighteenth Amendment was consummated on December 5, 1933. Upon the ratification of the Twenty-first Amendment the Eighteenth Amendment at once became inoperative. Neither the Congress nor the Courts could give continued vitality. The continuance of the prosecution of the defendants after the repeal of the Eighteenth Amendment for a violation of the National Prohibition Act alleged to be consummated in North Carolina, did involve an attempt to continue the application of the statute provisions after they had been deprived of force. This consequence is not altered by the fact that the crimes in question were alleged to have been committed while the National Prohibition Act was in effect. *In case a statute is repealed or rendered inoperative no further proceeding can be had to enforce it in pending prosecution unless competent authority has kept the statute alive for that purpose.*" (Italics ours).

It follows therefore that there is no basis for the assumption of the Court below, that the 1940 Act did not materially change 22 U. S. C. A. 233 and in the absence of any expressed intention of the Congress to the effect that 8 U. S. C. 157 extends to the 1940 Act, it was error for the Courts below to so hold. Congress used language in the 1920 Act which properly construed, indicated that an alien convicted under the 1917 Act was deportable. It specifically failed to provide for the deportation of anyone convicted under an amendment of the provision involved herein although it well knew how to provide to make this act

effective and extend it to violations of amendments to certain other sections of that same statute as has been shown above.

In other words, the failure of Congress expressly to extend the 1920 Act to include Section 601, was obviously intentional and the Courts should refrain from effectuating by judicial construction that which Congress itself did not intend to accomplish, expressly or by implication.

POINT II

The petitioner's conviction was not the conviction of an alien within the meaning of the Act of 1920.

The act of 1920 refers to aliens convicted under the 1917 Act. At the time of his conviction in 1941, the petitioner was a naturalized citizen and had been naturalized under court decree for over five years. It was subsequent to service of his present sentence for the conviction and at the height of the war in 1943, and before the protective decisions of *Baumgartner* v. *United States*, 1944, 322 U. S. 665, requiring clear proof, and *Klapprott* vs. *United States*, 1949, 335 U. S. 601, 335 U. S. 942, requiring an inquest or hearing before the entry of a denaturalization judgment, and thus restraining the Department of Justice in these cases, that petitioner was persuaded to consent to cancellation of his naturalization rather than contest the proposed allegations of the Government's complaint convicted as he then stood of the non-registration charge to which he had pleaded guilty before the assault on Pearl Harbor, but for which he was not sentenced until some time thereafter.

The Courts below upheld the Government's contention that the rule of retroactivity of cancellation of citizenship operates in effect to make petitioner an alien at the time he was convicted in 1941 and thus brought him within the 1920 Act. The case of *Rosenberg* vs. *United States*, 60 F. 2d

475 (C. C. A. 3) was cited as authority for this proposition. The dictum in the *Rosenberg* case, on which the Court relied, however, held merely that a certificate of naturalization issued by a New York Court was void on the ground that the New York Court was without jurisdiction because the alien was a resident of Pennsylvania and had falsely stated that he was a resident of New York. All that dictum stands for is that a decree entered by a Court without jurisdiction is, of course, void and confers no rights. Such a decree and the certificate of naturalization issued thereunder could be collaterally attacked. In this case, however, the Court which naturalized petitioner had full jurisdiction both of the subject matter and of the person.

As against the *Rosenberg* case, the only authority cited by the Government and the Court below in support of their extraordinary position, the following numerous cases show that the decree upon which petitioner's certificate of naturalization was issued could not have been collaterally attacked:

Tutun vs. *United States*, 270 U. S. 568, 577 (1926). (The judgment granting a naturalization certificate entered, like other judgments of a court of record, is accepted as complete evidence of its own validity unless set aside):

Behrensmeyer vs. *Kreitz*, 26 N. E. 704 (Ill. 1891), (Certificate of naturalization presented by voter);

Johansen vs. *Staten Island Shipbuilding Co.*, 272 N. Y. 140 (1936) (whether a naturalized citizen's wife a citizen);

Oehlert vs. *Oehlert*, 124 N. E. 249 (Mass. 1919) (divorce action);

United States vs. *Ragazzini*, 50 Fed. 923 (C. C. S. D. N. Y. 1892) (indictment for selling naturalization certificate procured by fraud);

United States vs. *Parisi*, 24 F. Supp. 414, 420 (D. C. Md. 1938, per Chesnut, J.) (dictum);
Matter of Wolton, 125 Misc. 564 (Sup. Ct. N. Y. Co. 1925, per Levy, J.) (Same);
In re Fordiani, 120 Atl. 338 (Conn. 1923) (Same);
Yamashita vs. *Hinkle*, 260 U. S. 199 (1922) (invalidity appearing on the face of the certificate);
In re Gee Hop, 71 Fed. 274 (N. D. Cal. 1895) (Same);
Sato vs. *Hall*, 217 Pac. 520 (Cal. 1923) (Same).

It is submitted that the rule of retroactive cancellation has never been and should not be applied in so extreme and harsh a manner. The reference by Congress in the 1920 Act to *aliens* certainly was not intended to include naturalized citizens who might subsequently have their naturalization cancelled. As was so well stated in the majority opinion in *Madeiros* vs. *Watkins*, 166 F. (2d) 897, at page 900, the strictest proof is required if the determination will result in severing one from his home, business and all present connections.

This Court has frequently held that where there is doubt as to the meaning of the statute under which it is sought to deport petitioner, such doubt shall be resolved in favor of the alien. *Fong Haw Tan* vs. *Phelan*, 333 U. S. 6, 10 (1948); citing *Delgadillo* vs. *Carmichael*, 332 U. S. 388. In the *Delgadillo* case, the Court made these significant remarks:

> "Deportation can be the equivalent of banishment or exile. *See Bridges* vs. *Wixon*, 326 U. S. 135, 147, 89 L. ed. 2103, 211, 65 S. Ct. 1443. The stakes are indeed high and momentous for the alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and

> capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme."

This Court there held that it was a capricious application of the immigration laws to maintain that re-entry to the United States of a shipwrecked seaman from a foreign port to which he had been taken, was an entry within the meaning of the statutory provision subjecting to deportation an alien convicted of a crime within five years after entry. A *fortiori* it is a capricious application of the Act of 1920 to treat as a convicted alien a convicted citizen subsequently denaturalized.

Again, too strong emphasis cannot be placed on the fact that the education of the petitioner is meager. His understanding of the English language itself is limited. He had been employed for ten months in defense work following his release from prison after the service of his sentence at Milan, Michigan, early in 1943, and he insistently contends that he signed the consent believing that if he contested the case the Government would regard him and his wife as recalcitrants and make a *permanent* court record of his denaturalization, whereas, if he consented, the effect would merely be a *suspension* of citizenship privileges for the duration of the war.

No claim was made that he was ever informed or advised of his constitutional rights or any possible interrelationship of what he was signing with his right of domicile or deportability. He was not taken before the Court after he signed the so-called cancellation and waiver prepared by an assistant district attorney, so that the Court might make sure that he understood the significance of the proceedings.

In a similar case, *United States of America* vs. *Olden*, 84 Fed. Supp. 522, where counsel for petitioner herein appeared as the attorney for the defendant Olden, at a hearing on a motion to vacate a judgment of denaturalization entered in the United States District Court for the Southern District of New York on July 7, 1942, on a so-called consent of the defendant without a hearing or inquest, Judge Rifkind held that defendant's consent, though given without duress or coercion, was not an intentional surrender of citizenship made by one possessed of understanding of the proceedings or awareness of his rights and of the consequences of his act, and vacated the judgment.

The Court in that case also pointed out that he held a hearing and took evidence to determine the factual question whether defendant's consent to denaturalization was truly voluntary and consciously intended by him to effect the surrender of his citizenship. "Had the hearing revealed such conscious intent," said the Court, "it might have become necessary to consider the effect of the most recent Supreme Court decisions upon the proposition that a consent judgment rendered without inquest or hearing may be invalid," citing *Klapprott* v. *United States, supra.*

In the light of the language contained in the prevailing opinion of the Court, in the case last cited, the consent judgment rendered without inquest or hearing in the instant case would appear to be invalid and void. The following language in the *Klapprott* opinion is pertinent:

> "Thus it appears that statutes and rules have largely left for judicial determination the type of cases in which hearings and proof should precede default judgments. In this situation it is the final responsibility of this Court to formulate the controlling rules for hearings and proof. See *McNabb* v. *United States*, 318 U. S. 332, 341. For the following reasons it seems peculiarly appropriate that a

person's citizenship should be revoked only after evidence has established that the person has been guilty of prohibited conduct justifying revocation. * * * This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty. The consequences of such a deprivation may even rest heavily upon his children. 8 U. S. C. Sec. 719. As a result of the denaturalization here, petitioner has been ordered deported. 'To deport one who so claims to be a citizen, obviously deprives him of liberty. . . . It may result also in loss of both property and life; or of all that makes life worth living.' *Ng Fung Ho v. White*, 259 U. S. 276, 284. * * * Furthermore 60 (b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools. In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. * * * Petitioner is entitled to a fair trial. He has not had it. The Government makes no claim that he has. Fair hearings are in accord with elemental concepts of justice, and the language of the 'other reason' clause of 60 (b) is broad enough to authorize the Court to set aside the default judgment and grant petitioner a fair hearing."

In view of the decision in the Klapprott case, it is inequitable that the judgment of denaturalization entered against petitioner on a consent which was neither conscious nor voluntary, should have *prospective* application. A fortiori, it is a positive miscarriage of justice to attribute to Congress a purpose to make peti-

tioner's right to remain here dependent on a tortured construction of the Act of 1920 by applying the judgment of denaturalization *retroactively* and thus treating a convicted citizen subsequently denaturalized as though he were a convicted alien.

Where under the stress and necessities of war conditions, errors of officials and mistakes of individuals result in hardships on persons long domiciled here, the Government should be slow to afflict and quick to make retribution, neither reluctant nor evasive in correcting wrongs inflicted upon citizens, since a forthright recognition of injustice is the surest means of maintaining faith and confidence in our system of law. *Abo* v. *Clark*, 77 F. Supp. 806.

CONCLUSION

For the foregoing reasons, it is respectively urged that the judgment should be reversed and that petitioner be released on habeas corpus.

Respectfully submitted,

GEORGE G. SHIYA,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 260

UNITED STATES OF AMERICA EX REL. RICHARD EICHENLAUB, PETITIONER

v.

W. FRANK WATKINS, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION OF THE UNITED STATES FOR THE DISTRICT OF NEW YORK, OR SUCH PERSON, IF ANY, AS MAY HAVE THE SAID RICHARD EICHENLAUB IN CUSTODY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 20–22) is reported at 167 F. 2d 659.

JURISDICTION

The judgment of the Court of Appeals was entered May 3, 1948 (R. 23). On July 30, 1948, Mr. Chief Justice Vinson extended to September 3, 1948, petitioner's time to file a petition for a writ of certiorari (R. 24), and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the warrant for petitioner's deportation is subject to attack in the present habeas corpus proceeding on any of the grounds alleged here by petitioner, namely, that:

(1) He was not properly convicted of a crime specified in the relevant deportation statute.

(2) He was not an alien, because his denaturalization was had "by default on consent of the petitioner"; or

(3) The warrant of deportation did not contain sufficient findings.

STATUTES INVOLVED

Section 3 of Title VIII of the Act of June 15, 1917, entitled "An Act To punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," originally provided (40 Stat. 217, 226):

> Whoever, other than a diplomatic or consular officer or attaché, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be fined not more than $5,000, or imprisoned not more than five years, or both.

This section was amended by Section 6 of the Act of March 28, 1940, entitled "An Act to amend the Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917, as amended, to increase the penalties for peacetime violations of such Act," 54 Stat. 79, 80, to read as follows:

> * * * Whoever, other than a diplomatic or consular officer or attaché, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $5,000.

Section 1 of the Act of May 10, 1920, c. 174, 41 Stat. 593–594, 8 U. S. C. 157, provides:

> That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, upon the warrant of the Secretary of Labor,[1] be taken into his custody and deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the resi-

[1] Under the authority of 1940 Reorganization Plan No. V, 54 Stat. 1238, "Attorney General" is substituted for "Secretary of Labor."

dence of aliens in, the United States," if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States, to wit:

* * * * *

(2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts, the judgment on such conviction having become final, namely:

(a) An Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917, or the amendment thereof approved May 16, 1918;

* * * * *

STATEMENT

Petitioner first entered the United States on February 23, 1930 (R. 11), and was naturalized as an American citizen on December 17, 1936 (R. 5). Thereafter he visited Germany and returned to this country on August 20, 1937 (R. 5). On September 3, 1941, in the United States District Court for the Eastern District of New York, petitioner pleaded guilty (Pet. 3) to a charge of conspiracy to act as an agent for a foreign government without being registered with

the Secretary of State. Title VIII Sec. 3 of the Act of June 15, 1917, 40 Stat. 226, which made it an offense for such an agent to fail so to register, was originally codified as 22 U. S. C. (1934 ed.) 233, and the indictment referred to the section by that designation (see R. 14, 20).

On January 25, 1944, on petitioner's consent (Pet. 4), a judgment was entered in the United States District Court for the Southern District of New York, cancelling his United States citizenship (R. 12). Thereafter deportation proceedings were instituted against petitioner pursuant to the Act of May 10, 1920, c. 174, Secs. 1–3, 41 State. 593–594 (8 U. S. C. 157), and after a hearing before an Immigration Inspector and review by the Board of Immigration Appeals, both of whom made findings of fact (R. 12, 22), a warrant directing his deportation was issued on October 9, 1945 (R. 2–3). Thereupon petitioner filed a petition for a writ of habeas corpus in the District Court for the Southern District of New York (R. 5–9). The writ was granted (R. 3–4), and after the filing of a return (R. 10–13) and a hearing, it was dismissed (R. 14–15, 15–16). On appeal (R. 16–17), the Court of Appeals for the Second Circuit affirmed the order of the district court (R. 23).

ARGUMENT

1. Petitioner's primary contention (Pet. 7, 10–17) appears to be that he was not subject to deportation because his conviction in 1941 was not for an offense specified in Section 1 of the Act of May 10, 1920, 41 Stat. 593, 8 U. S. . 157, *supra*, pp. 3–4, the deportation statute under which the warrant was issued. In 1941 petitioner was sentenced on his plea of guilty to conspiring to violate 22 U. S. C. 233. This section was originally passed as part of the Act of June 15, 1917, c. 30, Title VIII, Sec. 3, 40 Stat. 226, *supra*, p. 2, and read:

> Whoever, other than a diplomatic or consular officer or attaché, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Section 6 of the Act of March 28, 1940, 54 Stat. 80, entitled "An Act to amend the Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917, as amended, to increase the penalties for peacetime violations of such Act," provided:

> Sections 1, 2, and 3 of title VIII of such Act, as amended, are amended by striking out of each of such sections "shall be fined not more than $5,000 or imprisoned not more than five years, or both", and inserting in lieu of the matter stricken out the following: "shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $5,000."

The marginal identification of the earlier statute at 54 Stat. 80 reads, "40 Stat. 226. 22 U. S. C., §§ 231–233: Disturbance of foreign relations." In the 1940 and 1946 editions of the United States Code, Section 3, Title VIII of the Act of June 15, 1917, was renumbered 22 U. S. C. 601 instead of 22 U. S. C. 233. See 22 U. S. C., 1940 ed., p. 1909; 22 U. S. C., 1946 ed., p. 2271:

> CODIFICATION
>
> Former sections 233–233g are now sections of this title as follows: 233 is 601; * * *

It is clear, therefore, that what is currently designated 22 U. S. C. 601 is Section 3, Title VIII of the Act of June 15, 1917, as amended, which formerly was designated 22 U. S. C. 233.

Petitioner, having been convicted of conspiracy to violate this statutory provision, falls directly within the unambiguous provisions of the deportation statute, Section 1 of the Act of May 10, 1920, 41 Stat. 593, 8 U. S. C. 157. No amendment

to the deportation statute was passed to remove such offenders from its scope; and it is inconceivable that when Congress decided in 1940 that the offense warranted even greater penalties than were originally prescribed, the offenders were to be considered less undesirable aliens.

2. Upon denaturalization, petitioner became an alien. Even without applying the manifestly relevant and correct principle that the cancellation of naturalization for fraud in its procurement operates to revoke citizenship *ab initio,* thereby having the legal effect of rendering the person an alien at all times (*Rosenberg* v. *United States,* 60 F. 2d 475 (C. C. A. 3)), it is clear, under the express terms of the deportation statute, that, once petitioner was denaturalized, he was deportable because of the past conspiracy conviction, regardless of his status at the time of the conviction.

3. Petitioner is attempting in this proceeding collaterally to attack his conviction for conspiracy and the judgment of denaturalization entered against him. Since there is nowhere presented any basis for a contention that the courts which entered such judgments were without jurisdiction to act, the attacks on these judgments cannot be heard in this habeas corpus proceeding. *Knewel* v. *Egan,* 268 U. S. 442, 445; *Goto* v. *Lane,* 265 U. S. 393, 402; *In re Coy,* 127 U. S. 731, 758.

Further, the attacks are manifestly without substance. As to the conspiracy conviction, peti-

tioner pleaded guilty and was sentenced on his plea. Nowhere in the record is there any indication that his plea of guilty was not freely and intelligently entered. His present argument that "the indictment, to which petitioner pleaded guilty, [was] so vague and uncertain as to create serious doubt that the petitioner was even charged with violating any section enumerated in the Act of May 10, 1920, conviction of which would make the petitioner subject to deportation" (Pet. 3), is a belated afterthought, not cognizable in the present proceeding.[2] The habeas corpus court cannot look into the details of crime of which petitioner was convicted. *United States* v. *Day*, 54 F. 2d 336 (C. C. A. 2).

Similarly without merit is petitioner's attack on the decree of naturalization. The petition for certiorari states that the decree was entered "by default on consent of the petitioner without a hearing" (Pet. 3, 18–21). However, this contention is apparently being made for the first time in this Court. The petition for habeas corpus (R. 5–9) did not challenge the validity of the denaturalization decree; and neither of the courts below passed upon this question. Indeed, the petition for certiorari itself discloses (p. 18) that "petitioner has made a direct attack upon the

[2] The indictment does not appear in the record. The Court of Appeals said: "In 1941, he was convicted of the crime of having conspired to act as an agent for a foreign government without having registered. The indictment referred to 22 U. S. C. A. § 233." (R. 20.)

validity of this judgment of denaturalization in the same [i. e., District] Court, but that motion has been denied. An appeal from the District Court's decision has been taken to the Circuit Court of Appeals for the Second Circuit and is now pending."

In any event, the fact that petitioner consented to the entry of a denaturalization decree against him, as the petition for certiorari admits (p. 18), distinguishes this case from *Klapprott v. United States*, No. 42, now pending before this Court. The case would appear on its facts to be more closely akin to *United States* v. *Borchers*, 163 F. 2d 347, 349 (C. C. A. 2), certiorari denied, 332 U. S. 811.

4. Petitioner's final contention is that warrant of deportation did not contain sufficient findings of fact without what petitioner conceives to be the ruling in *Mahler* v. *Eby*, 264 U. S. 32. The record before this Court is not complete. The courts below had before them the certified file of the Immigration and Naturalization Service, which contained the findings of the Immigration Inspector and of the Board of Immigration Appeals. In this connection the court below said (R. 22):

> [Petitioner] also urges that the deportation warrant is defective, as not in accord with 8 U. S. C. A. § 157, since it states that he is "a member of the undesirable classes of alien residents enumerated in

said Act" and does not state that he, as an individual, has been found to be an "undesirable resident." He cites *Mahler* v. *Eby*, 264 U. S. 32. But there the Court said (p. 43) that the defect in the warrants had not been met by other matter in the record. Here we have an explicit finding in the administrative proceedings that relator "is an undesirable resident." It would serve no useful purpose to remand to permit amendment of the warrant to conform to that finding.

Petitioner has not denied that such explicit finding was made; nor does he contend that such finding, which preceded the warrant of deportation under attack, was unsupported by evidence.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 3

UNITED STATES EX REL. RICHARD EICHENLAUB, PETITIONER

v.

EDWARD J. SHAUGHNESSY, AS ACTING DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION OF THE UNITED STATES FOR THE DISTRICT OF NEW YORK, OR SUCH PERSON, IF ANY, AS MAY HAVE THE SAID RICHARD EICHENLAUB IN CUSTODY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 12-14), affirming the order which dismissed the writ of habeas corpus, is reported at 167 F. 2d 659. The opinion of the District Court (R. 8-9) is not reported.

JURISDICTION

The petition for a writ of certiorari was filed on September 3, 1948. Certiorari was denied on

November 15, 1948, but the order was vacated and certiorari granted on June 27, 1949. (R. 17.) The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

The Act of May 10, 1920 provides that among the aliens subject to deportation if found to be undesirable residents are "all aliens who since August 1, 1914, had been or may hereafter be convicted" of certain specified offenses. The questions presented are:

1. Whether the crime of which petitioner was convicted is one of those enumerated in the statute.

2. Whether the statute applies to an alien, such as petitioner, who was a naturalized citizen when he was convicted but has since been denaturalized.

3. Whether the requisite administrative finding was made that petitioner is an "undesirable resident."

4. Whether the judgment of denaturalization may be attacked in this habeas corpus proceeding, and if so, whether the judgment entered with petitioner's consent was valid without proof of the allegations of fraud.

STATUTE INVOLVED

Section 1 of the Act of May 10, 1920, c. 174, 41 Stat. 593-594, 8 U. S. C. 157, provides:

> That aliens of the following classes, in addition to those for whose expulsion from the

United States provision is made in the existing law, shall, upon the warrant of the Secretary of Labor, be taken into his custody and deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States," if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States, to wit:

* * * * *

(2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts, the judgment on such conviction having become final, namely:

(a) An Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917, or the amendment thereof approved May 16, 1918;

* * * * *

STATEMENT

Petitioner entered the United States from Germany in 1930 and became an American citizen by naturalization on December 17, 1936. He has resided in this country continuously since August 20, 1937, when he returned from a visit to Germany.

On September 3, 1941, he was convicted on his plea of guilty to the charge of having conspired to act as an agent for a foreign government without being registered with the Secretary of State, and was sentenced to imprisonment for 18 months and fined $1,000. (R. 7.)

On January 25, 1944, on petitioner's consent (Pet. 4), a judgment was entered in the United States District Court for the Southern District of New York cancelling his citizenship on the ground of fraud. Thereafter, deportation proceedings were instituted against petitioner pursuant to the Act of May 10, 1920, c. 174, 41 Stat. 593-594 (8 U. S. C. 157), and, after a hearing before an Immigration Inspector and review by the Board of Immigration Appeals, both of whom made findings of fact (R. 7) petitioner was ordered deported (R. 1-2). The warrant of deportation which was issued on October 9, 1945, recited that petitioner was deportable under "the Act approved May 10, 1920 in that he has been found to be a member of the undesirable classes of alien residents enumerated in said Act, to wit, an alien who since August 1, 1914 has been convicted of conspiracy (18 U. S. C. 88) to violate an Act entitled, 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917 (22 U. S. C. 233)" (R. 2).

A petition for a writ of habeas corpus was filed in the District Court for the Southern District of New York, in which petitioner alleged that the warrant of deportation was issued without authority of law; that the proceedings were unfair and the findings unsupported by evidence; and that the warrant of deportation was based on an erroneous construction of law (R. 3-5). Upon the return (R. 6-8) and an examination of the immigration file (see R. 8), the writ was dismissed (R. 9-10), and on appeal to the Court of Appeals for the Second Circuit, the order of dismissal was affirmed (R. 15).

SUMMARY OF ARGUMENT

A. It is clear that the charge to which petitioner pleaded guilty, namely, a conspiracy under 18 U. S. C. 88 to violate the provisions of 22 U. S. C. 233, by conspiring to act as an agent of a foreign government without prior notification to the Secretary of State, is one of the offenses enumerated in the Act of May 10, 1920, for conviction of which an alien may be deported if he is found to be an undesirable resident. The Act of June 15, 1917, defining the offense, has not been repealed; in fact, the penalty for its violation has been increased.

B. The Act of May 10, 1920, does not expressly exclude from its provisions aliens who, at the time of their conviction, were naturalized citizens. The presence in the statute of the phrase "may hereafter be convicted" does not indicate a legis-

lative intention that alienage and conviction must be contemporaneous but signifies merely that, in respect of the time of conviction, the statute shall operate prospectively as well as retrospectively. And no reason is apparent why Congress should have excepted from deportation an alien who not only committed one of the specified wartime offenses, but also fraudulently procured his naturalization. The crucial factor is the alien's *present* undesirability as a resident of this country. Under the express terms of the deportation statute, once petitioner was denaturalized, he was deportable because of the past conspiracy conviction regardless of his status at the time of the conviction.

If the statute should be construed to require that the alien must have been in that status at the time of his conviction, petitioner nevertheless is within its scope. The cancellation of his naturalization for fraud in its procurement operated to revoke his citizenship *ab initio*, thereby having the legal effect of rendering him an alien at all times.

C. Although the warrant of deportation can be read as not explicitly stating that petitioner has been found to be an undesirable resident, it is clear from the other matter in the administrative file that this finding was made by the immigration officials, and hence the statutory requirement has indeed been met.

D. Petitioner's attack on the judgment of denaturalization is a belated afterthought, which is

made for the first time in this Court. Since petitioner's direct attack on that judgment is now pending in the Court of Appeals for the Second Circuit, considerations of proper judicial administration should preclude its consideration here. It should, in any event, be disregarded as a collateral attack upon a judgment without any basis since no contention is made that the court which entered the judgment was without jurisdiction to act. Moreover, since the denaturalization judgment was entered with petitioner's consent, it was not incumbent on the Government to produce evidence of the petitioner's fraud in procuring the certificate of naturalization.

ARGUMENT

The Act of May 10, 1920 (*supra*, pp. 2-3), provides that aliens convicted of violations of specified wartime legislation shall be deported if they are found by the Secretary of Labor [1] to be undesirable residents. The Attorney General has determined that petitioner was convicted in 1941 of one of the specified crimes and that he is an "undesirable resident," and, therefore, has ordered him deported. Petitioner contends (1) that the crime of which he was convicted is not one of those specified in the 1920 deportation statute; (2) that at the time of his conviction he was a naturalized citizen and,

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[1] Now the Attorney General, to whose direction and supervision the functions of the Immigration and Naturalization Service were transferred. 1940 Reorganization Plan No. V, 54 Stat. 1238, effective June 14, 1940.

therefore, not within the purview of the deportation statute; (3) that the warrant of deportation is inadequate; and (4) that because of defects in the denaturalizing proceeding, he is not an alien at all, and, therefore, not subject to deportation. We submit that none of these contentions has merit.

I

Petitioner Is Within the Class of Alien Criminals Who Are Deportable as Undesirable Residents

A. *Petitioner was convicted of a crime specified in the Act of May 10, 1920.*—Among the crimes upon conviction of which an alien may be deported under the Act of May 10, 1920 (*supra*, pp. 2-3), if he is found to be an undesirable resident, is a "conspiracy to violate * * * an Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917, or the amendment thereof approved May 16, 1918."

Section 3 of Title VIII, of the Act of June 15, 1917 (40 Stat. 226), reads as follows:

> Whoever, other than a diplomatic or consular officer or attaché, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Section 6 of the Act of March 28, 1940, 54 Stat. 80, entitled "An Act to amend the Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917, as amended, to increase the penalties for peacetime violations of such Act," provided:

> Sections 1, 2, and 3 of title VIII of such Act, are amended by striking out of each of such sections "shall be fined not more than $5,000 or imprisonment not more than five years, or both", and inserting in lieu of the matter stricken out the following: "shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $5,000."

Prior to 1940, Section 3 of Title VIII of the 1917 Act was codified as Section 233 of United States Code, Title 22. It was renumbered Section 601 [2] in the 1940 edition of the Code without any change in substance except the incorporation of the increased penalty prescribed by the 1940 amendment. See 22 U. S. C. [1940 ed.] p. 1909. It is clear, therefore, that in 1941, when petitioner was convicted, the substantive crime described in 22 U. S. C. 601, which was previously 22 U. S. C. 233, was identical with that originally enacted as

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[2] In the 1948 revision of the United States Code this section now appears as 18 U.S.C. 951.

Section 3 of Title VIII of the Act of June 15, 1917, and, therefore, is one of the enumerated offenses for which an alien is rendered subject to deportation under the Act of May 10, 1920 upon a finding that he is an undesirable resident. Clearly, the 1940 act did not repeal but merely increased the penalty prescribed in the 1917 statute. With the identity of the several sections thus established, it is beyond doubt that the crime of which petitioner was convicted, namely a conspiracy under 18 U. S. C. 88 to violate the provisions of 22 U. S. C. 233,[3] was one of those specified in the 1920 deportation statute.

Petitioner's argument (Br. 9-12) that the Act of March 28, 1940, materially changed Section 3 of Title VIII of the Act of June 15, 1917, is completely without merit. The title of the 1940 act expressly states that its purpose was merely "to amend" the 1917 act so as to increase the penalties for peacetime violations; the definition of the offense was untouched. The legislative history (see S. Rep. 598, 76th Cong., 1st sess.; H. Rep. 1716, 76th Cong., 3d sess.) puts it beyond doubt that Congress did not intend to create a new offense

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[3] Neither the indictment nor the judgment of conviction appear in the record. The return to the writ of habeas corpus, to which no traverse was made, states (R. 7) that petitioner was convicted "on September 3, 1941 of having conspired to act as an agent for a foreign Government without being registered, and as such agent, to accumulate information for transmittal to a foreign Government (18 U.S.C. 88; 22 U.S.C. 233)." Although the substantive offense should have been cited as 22 U.S.C. 601, the error did not mislead petitioner to his prejudice, and, therefore, was immaterial. See Rule 7(c), F. R. Crim. P.

or to alter the 1917 statute in any respect except to give greater discretion to the courts in imposing punishment.

It is inconceivable that when Congress decided in 1940 that the offense warranted greater penalties than were originally prescribed, the offenders were to be considered less undesirable aliens. And yet, in essence, that is the very argument petitioner advances (Br. 10). Its unsoundness is demonstrated by the fact that on March 27, 1940, one day prior to the authorization of increased penalties for violations of the Act of June 15, 1917, Congress passed and sent to the President a bill (H.R. 6724, 76th Cong., 3d sess.) to expedite the deportation of aliens convicted under that act of espionage and sabotage by providing for their automatic expulsion, thereby obviating the need for an administrative finding that they were undesirable residents. See H. Rep. 829, S. Rep. 918, 76th Cong., 1st sess. This action is incompatible with the inference, urged by petitioner, that Congress considered the remedy of deportation inapplicable because of the availability of increased criminal punishment. The bill was vetoed by President Roosevelt because it included a provision for the mandatory deportation of habitual users of narcotic drugs. He explained, however, that "* * * Ample authority is found in the existing law for the deportation of aliens guilty of such activities [espionage, sabotage, etc.] for the Secretary of Labor is already authorized to deport them if,

after hearing, it is found that they are undesirable residents of the United States (U.S.C., title 8, sec. 157). Further legislation on this subject appears to be unnecessary and superfluous." Message from the President, H. Doc. No. 689, 76th Cong., 3d sess.

There is no significance in the circumstance, upon which petitioner relies (Br. 13-15), that in respect of the deportable offenses enumerated in subparagraphs 2(e) and 2(g) of the Act of May 10, 1920, Congress used all-inclusive terminology, e.g., "any amendment thereof or supplement thereto", whereas it specified only one amendment in subparagraph 2(a), which sets forth the offense involved here. The reason for the difference in treatment is obvious. Subparagraphs 2(e) and 2(g) deal with statutes of a broad and comprehensive nature involving subject matters of extreme fluidity during wartime, and amendments were necessarily frequent. It would have been cumbersome draftsmanship to have referred to all the changes up to the time of the enactment of the Act of May 10, 1920. On the other hand, there was only one amendment of the statute described in subparagraph 2(a) and it was convenient, therefore, to specify that particular amendment.

Far from being the comfort to petitioner which he asserts (Br. 7), the decision in *United States* v. *Heine*, 151 F. 2d 813 (C. A. 2), certiorari denied, 328 U. S. 833, involving a co-defendant in the count of the indictment to which petitioner pleaded guilty,

undermines his contention that the charge against him was improperly designated a conspiracy to violate 22 U. S. C. 233. For Heine's conviction on that very charge was affirmed.

B. *The fact that petitioner was ostensibly a naturalized citizen at the time of his conviction is immaterial.*—For our answers to petitioner's contention that the Act of May 10, 1920, does not apply to him since he was a naturalized citizen at the time of his conviction in 1941, we respectfully refer the Court to our brief in the *Willumeit* case (No. 82, this Term).

C. *Petitioner was found to be an "undesirable resident."*—As a condition precedent to the deportation of petitioner, the Attorney General must find that he is an "undesirable resident." Act of May 10, 1920, c. 174, 8 U. S. C. 157, *supra; Mahler v. Eby*, 264 U. S. 32. Petitioner contended below and in his petition for certiorari that no such finding was made in his case. His contention now is less specifically phrased (Br. 2, 8) and we shall deal with the point as originally made.

Although the warrant of deportation (R. 1-2) is less explicit than may be desirable in that it merely states "he has been found to be a member of the undesirable classes of alien residents enumerated in said Act to wit, an alien who since August 1, 1914 has been convicted of conspiracy," etc., there is, as the Court of Appeals noted (R. 14) "an explicit finding in the administrative proceedings that re-

lator 'is an undesirable resident'." [4] Thus the situation is clearly distinguishable from that in *Mahler* v. *Eby*, where the defect in the warrants was not met by other matter in the record.

The sufficiency of the evidence to support a finding that petitioner is an undesirable resident is not open to question. The quantum of evidence required to support a finding of undesirability in the case of alien enemies who were merely interned during the war and that required for the deportation of alien enemies who were convicted of wartime crimes, may be different, but it is clear at least that in the latter case, the alien's conviction alone is enough to justify a finding of undesirability as a resident. *Mahler* v. *Eby*, 264 U. S. 32. And since petitioner has been found an undesirable resident, and since he would not be entitled to any further hearing to present additional evidence, no useful purpose would be served in remanding merely for amendment of the warrant of deportation to state explicitly in that document the finding of undesirability. The only questions open on habeas corpus are whether (1) the Attorney General correctly construed the deportation statute; (2) procedural due process was satisfied; (3) the findings required by the statute were made, and (4) the order was based on some evidence. (See Douglas, J.,

[4] The administrative file, though not in the printed record, was used in the argument in the Court of Appeals and is now on file in this Court. It shows that the Board of Immigration Appeals found as a fact (see page 5 of its Opinion): "That the respondent is an undesirable resident of the United States."

dissenting in *Ludecke* v. *Watkins*, 335 U. S. 160, 184-185, 187, and cases therein cited.) Petitioner has failed to sustain his position on any of these points, and his detention, therefore, should not be disturbed.

D. *The judgment of denaturalization is not open to attack in these proceedings.*—It appears that petitioner has made a direct attack upon the denaturalization judgment in another proceeding and his appeal from an adverse decision is now pending in the Court of Appeals for the Second Circuit. For that reason alone, the collateral challenge here made should be disregarded. The petition for a writ of habeas corpus in this case (R. 3-5) did not challenge the validity of the decree and neither of the courts below in the present case passed upon the question. Furthermore, since the court which entered the judgment had jurisdiction to act, the validity of the judgment cannot be reviewed collaterally. *Knewel* v. *Egan*, 268 U. S. 442, 445; *United States ex rel. Knauer* v. *Jordan*, 158 F. 2d 337 (C. A. 7), certiorari denied, 331 U. S. 810.

Petitioner appeared and, with the aproval of his attorney, consented to the entry of a judgment of denaturalization. His argument that the court lacked jurisdiction to enter a judgment of denaturalization by consent is without merit. Cf. *United States* v. *Borchers*, 163 F. 2d 347, 349 (C. A. 2), certiorari denied, 332 U. S. 811. In *Klapprott* v. *United States*, 335 U. S. 601, the contention that citizenship cannot be lost by a default judgment

was rejected by a majority of this Court. *A fortiori,* when there is consent, freely and voluntarily given, to the entry of the judgment of denaturalization, such a judgment is within the jurisdiction of the court to enter. For such consent is surely an adequate substitute even for the evidence in support of the complaint which some members of this Court would require to be adduced in default cases. *Klapprott* v. *United States, supra.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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NOVEMBER 1949.

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 82

THE UNITED STATES OF AMERICA, EX REL. OTTO A. WILLUMEIT, PETITIONER,

vs.

W. F. WATKINS DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 26, 1949.

CERTIORARI GRANTED JUNE 27, 1949.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 82

THE UNITED STATES OF AMERICA, EX REL. OTTO A. WILLUMEIT, PETITIONER,

vs.

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[fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel., OTTO A. WILLUMEIT, Relator-Appellant,

vs.

W. F. WATKINS, • • • Immigration and Naturalization Service, or whosoever may have custody of Otto A. Willumeit, etc., Respondents-Appellees

STATEMENT UNDER RULE 15, SUBDIVISION (b)

This is an appeal from an order of the Honorable Alfred C. Coxe, United States District Judge, entered on December 17, 1947, in the Office of the Clerk of the United States District Court for the Southern District of New York, dismissing a writ of habeas corpus and remanding the relator to the custody of the respondent, after oral argument. No opinion was rendered.

The appellant is represented by the Legal Aid Society (Eugene H. Nickerson of Counsel) and the respondent is represented by John F. X. McGohey, United States Attorney for the Southern District of New York (Harold J. Raby of Counsel).

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 42-30

WRIT OF HABEAS CORPUS

To: W. Frank Watkins, District Director of Immigration and Naturalization for the District of New York and/or whomsoever may have the custody of the body of Otto A. Willumeit

You are hereby commanded that you have the body of Otto A. Willumeit, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, before one of the Judges of the United

States District Court within and for the District aforesaid, on the 13th day of June 1947 at 10:30 o'clock in the forenoon of that day, in the United States Court House, Room 506, in the Borough of Manhattan, City of New York, to do and receive all and singular those things which the said Judge shall then and there consider of you in this behalf, and have you then and there this Writ.

Witness, the Honorable John C. Knox, Judge of this Court, at New York, N. Y., in the said District, this 6th day of June, 1947.

(S.) William V. Connell, Clerk.

Writ allowed. June 6th, 1947.

(S.) Alfred C. Coxe, U. S. D. J.

[fol. 3] IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF HABEAS CORPUS

The Petitioner Otto Albert Willumeit, respectfully represents and charges unto the Court as follows:

1. That he is restrained, detained and deprived of his liberty within the Southern District of New York, N. Y. and the territorial jurisdiction of this Court by the Respondent W. F. Watkins, as District Director of Immigration and Naturalization of the United States District Court of New York and his agent, under color of authority of the United States of America.

2. That the restraint, detention and deprivation of the liberty of this Petitioner arose out of the following facts and circumstances:

3. That in the year of 1925 this Petitioner lawfully entered the United States; that in the year of 1925 Petitioner made a declaration of intention to become an American citizen, and thereafter *was admitted to citizenship on or about the month of April, 1931* in the Lake Superior Court of Hammond, Indiana; that in the year of 1942 and eleven years after this Petitioner had been admitted to citizenship, the United States of America instituted proceedings against him to cancel his certificate of naturalization and [fol. 4] to denaturalize him upon the claim that said certificate had been procured by fraud; that subsequently, in the

year of 1944, a decree cancelling this Petitioner's certificate of citizenship and denaturalizing him was entered by the District Court for the Southern District of Illinois, Eastern Division;

4. That on April 27, 1946 this Petitioner was arrested by certain agents of the United States Bureau of Immigration and Naturalization and taken to Ellis Island, New York; That said arrest so made by said agents was based upon the claim asserted by them that Petitioner was an alien enemy whose presence in the United States was dangerous to the public peace and safety, and upon no other ground or claim whatsoever, and that said agents were subordinates of the said W. F. Watkins who is made Respondent in the Petition and has stated that they are about to take him to Ellis Island, New York and from there to remove him from the United States to some place unknown to this Petitioner.

5. That on November 7, 1946 a petition for rehearing of the Final Order and Decree entered in the United States District Court, Chicago, Illinois, in the denaturalization matter of this Petitioner was presented and filed before the Hon. Judge Campbell of that Court;

[fol. 5] 6. That Petitioner is informed that up to date of the filing of this writ no decision has been rendered on said petition for rehearing by the Hon. Judge Campbell.

Wherefore, Petitioner prays that a writ of habeas corpus be issued directed to W. F. Watkins, as District Director of Immigration, requiring him to bring before the Court said Petitioner to do and receive what this Court shall then and there consider concerning him on his behalf, and to restrain the said W. F. Watkins to remove the Petitioner from the United States until such time, a decision has been rendered in the now pending application for rehearing on Petitioner's illegal denaturalization and up to and including the statutory time limit, in which, if need be, Petitioner has a right to appeal an adverse decision of the lower court to the Circuit Court of Appeals.

(S.) Otto A. Willumeit. Otto Albert Willumeit, in person.

[fol. 6] *Duly sworn to by Otto Albert Willumeit. Jurat omitted in printing.*

[fol. 7] IN UNITED STATES DISTRICT COURT

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

The petitioner Otto Albert Willumeit, respectfully represents and charges unto the Court as follows:

1. That he is restrained, detained and deprived of his liberty within the Southern District of New York, New York, and the territorial jurisdiction of this Court by the respondent W. F. Watkins, as Director of Immigration and Naturalization of the United States District of New York and his agents, under color of authority of the United States of America.

2. That the restraint, detention and deprivation of the liberty of this petitioner arose out of the following facts and circumstances:

3. That the petitioner was born in Sarrebourg, France, then a part of the German Empire, and lawfully entered the United States; that in the year of 1925 he made a declaration of intention to become an American citizen, and thereafter was admitted to citizenship on or about the month of April, 1931. That in the year of 1942 and more than five years after this petitioner had been admitted to citizenship, the United States of America instituted proceedings against him to cancel his certificate of naturalization and to denaturalize him upon the claim that said certi- [fol. 8] ficate had been procured by fraud; that subsequently a decree cancelling this petitioner's certificate of citizenship, and denaturalizing him was entered by the District Court for the Northern District of Illinois, Eastern Division;

4. That at all times prior to April, 1931, it was provided by the laws of Germany:

"A German who has neither his residence nor a permanent abode in Germany loses his citizenship in acquiring foreign citizenship, provided the foreign citizenship is acquired as a result of his own application therefor . . .

"Citizenship is not lost by any one who before acquiring foreign citizenship has secured on application the written consent of the competent authorities of his home state to retain his citizenship."

That at the time of said naturalization, this petitioner had no residence or permanent abode in Germany, that he became a citizen of the United States as a result of said application for citizenship, that prior to acquiring the United States citizenship he did not apply for or secure the written consent of the proper authorities of his former home state to retain his citizenship.

5. That upon the cancellation of petitioners certificate of citizenship, he has become, and now is a stateless person;

6. That on April 27, 1946 this petitioner was arrested by certain agents for the United States Bureau of Immigration [fol. 9] and Naturalization and taken to Ellis Island, New York;

7. That said arrest so made by said agents was based upon the claim asserted by them that this petitioner was an alien enemy whose presence in the United States was dangerous to the public peace and safety, and upon no other ground or claim whatsoever and that said agents were subordinates of said W. F. Watkins who is made respondent in this Petition and have stated that they are about to take him to Ellis Island, New York and from there to remove him from the United States to some place unknown to this petitioner.

8. That Tom C. Clark, Attorney General of the United States, claims, asserts that his Excellency, Harry S. Truman as President of the United States, "by proclamation" on July 14, 1945 "acting under the authority of the Alien Enemy Act of 1798 (50 U. S. C. 21-24)" made the "following regulations additional and supplemental to those prescribed by earlier proclamations:

> 'All alien enemies now and hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of [fol. 10] government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom

in accordance with such regulations as he may prescribe'."

9. That the petitioner is pursuing his petition for rehearing in the United States District Court in Chicago and an appeal from an adverse ruling in any court will be taken within the statutory time limit.

10. This petitioner states that said restraint and detention of him, and the said deprivation of his liberty, by the said respondent, as aforesaid, is wrongful, illegal, and wholly without authority of law, for the following reasons:

1. Petitioner is not a native and citizen of Germany. Petitioner was born at Sarrebourg, Lorrain, then a part of the German Empire. Lorrian reverted back to France under the Versailles Treaty in 1919. Petitioner entered the United States under the French Immigration quota, and was considered by the Department of State a native of France which department issued a passport to the petitioner in 1933 with the following passport entry: Place of birth: France.

[fol. 11] In support of petitioners contention ~~that~~ he is a native of France, petitioner calls attention to the case "D'Esquiva v. Uhl" and quotes in substance therefrom:

* * * "The question of nativity is not a question of allegiance but a question simply of geography, locality of place of birth, and if we have to decide where a person is born we have to look at the spot on the map and we have to ask ourselves today, on the day when the matter is in Court, to which country belongs this spot? And if the answer is that it is in France, then the man is a native of France." * * * That is what the government said in the D'Esquiva case: "Well, you were born, let us say, in Vienna and Vienna was not a part of Germany. At the time of your birth, but not today, after the Anschluss, after the annexed Austria, since 1938, Vienna is a part of greater Germany of Hitler, and therefore, you are a native of Germany." * * * On this theory the D'Esquiva case was decided. The Court heard the entire argument of the government and put in the final decision, and they exemplified in the decision—they

said: "Let us take a man born in Alsace-Lorra ine. That may have been German at the time of his b rth. This does not make him a native of Germany in our [fol. 12] opinion." * * * That is the langua the court uses in his decision. And as a final proo of the validity of this argument, the petitioner refe to the brief of the government and the decision of the Circuit Court of Appeals. The petitioner fur her refers to the case of "Unecker v. McCoy" S.D. There, apparently the D'Esquiva decision was very ably argued. Unecker was born in Alsace-Lorra ne, and that is exactly a parallel case; and there Ju ge Vogel, in a very able and persuasive decision, quot ing extensively from the D'Esquiva case, came to the c on- clusion, that we have to ask—at that time we were still at war, to that time Alsace-Lorrain was still occupied by Germany, he said, all that we have to ask is does our State Department recognize Alsace-Lorrain today as a part of France". And under instructions of this Judge, a telegram was sent to the Secretary of State Stettinius. Mr. Stettinius answered that despite the occupation of Alsace-Lorrain during the war, despite the fact, the Hitler government immediately after the occupation of Alsace-Lorrain in 1940 had incorporated this country into Germany, our State Department did not recognize Alsace-Lorrain as a part of Germany, [fol. 13] but has always considered it a part of France. (Also: Gregoire v. U. S., recently decided in the U. S. C.-C., 2. Circuit, S.D. N.Y.)

2. Petitioner, a stateless person, is not subject to the regulations prescribed for alien enemies. Definition of Alien Enemy in "Questions and Answers on Regulations Concerning Aliens of Enemy Nationalities", page 2, question 9 "Who is considered an alien enemy? Answer: A person who is stateless, but who was a citizen or subject of Germany, Italy, or Japan at the time he lost all citizenship, is considered an alien enemy, and is subject to the regulations prescribed for alien enemies."

3. Petitioner is informed and believes and, therefore, charges the fact to be, that at the time, petitioner lost all citizenship, he was neither a citizen or subject of

Germany, Italy, or Japan, but a citizen and subject of the United States of America.

Wherefore petitioner prays that a writ of habeas corpus be issued, directed to W. F. Watkins as District Director of Immigration, requiring him to bring before the court said petitioner to do and receive what this Court shall then and there consider concerning him on his behalf, and then and [fol. 14] there show cause, if any he has, for the taking and detention of said petitioner; and your petitioner further prays, that the said Court may determine the legality of the imprisonment or restraint and detention of the liberty and threatened deportation of said petitioner, and thereupon dispose of this case as the law and justice may require.

(S.) Otto A. Willumeit. Otto Albert Willumeit in person.

Duly sworn to by Otto Albert Willumeit. Jurat omitted in printing.

[fol. 15] In United States District Court

Return to Writ of Habeas Corpus

R. A. Vielhaber, says that he is and during all the times herein mentioned has been an attorney in the service of the United States Department of Justice, Immigration and Naturalization Service, attached to the office of the District Counsel, New York District; that in his official capacity he is authorized to make and in behalf of the respondent hereby makes the following return to the writ of habeas corpus herein.

In compliance with the direction of this Court, the body of the said alien in his own proper person is produced herewith before this Court at the time specified in the writ.

It is respectfully urged that upon its face the petition upon which the writ was granted is insufficient in law, and that the writ should therefore be quashed because

(a) The petition does not allege facts to show that the proceedings of the Department of Justice upon which was issued the warrant of deportation pursuant to which the said alien was held, were not regular, fair and in compliance with the statute applicable in such cases, nor facts

from which this Court can determine that the proceedings were either irregular, unfair or not in compliance with said [fol. 16] statute;

(b) The petition does not allege any facts which entitled this Court to review the findings and conclusion of the Department of Justice upon which the warrant of deportation was issued;

(c) It is not alleged that there was no evidence before the Department of Justice upon which it based or could have based its findings and conclusion in accordance with which the warrant of deportation was issued;

(d) It does not appear by allegation of facts that the issues sought by the petition now to be litigated in this Court have not already been determined by the Department of Justice adversely to the said alien in proceedings which were regular, fair and in compliance with the statute applicable thereto.

As appears by the records of the Department of Justice of the United States with respect to the above-named alien, which records are in possession of respondent and are available for inspection of the Court and of the relator:

1. This writ of habeas corpus relates to Otto Albert Willumeit or Otto Willameit, a forty-two year old native and citizen of Germany, who stated that he last entered the United States at El Paso, Texas, on or about October 24, 1941 and was admitted as a citizen of the United States, upon showing his citizenship certificate.

[fol. 17] 2. Relator was naturalized as a citizen of the United States in the Superior Court, Lake County, Indiana, on September 16, 1931. His naturalization was canceled in the United States District Court for the Northern District of Illinois, Eastern Division, on June 9, 1944 *nunc pro tunc*, as of May 23, 1944.

3. On October 14, 1946 and on October 16, 1946, a hearing was accorded the alien to show cause why he should not be deported, at the conclusion of which the presiding inspector recommended that relator be deported to Germany. On November 25, 1946, the Acting Commissioner, Immigration and Naturalization Service, ordered that the alien's hearing be reopened.

4. On January 9, 1947 and on January 10, 1947, the alien was granted a reopened hearing, at the conclusion of which the presiding inspector recommended his deportation to Germany.

5. On April 22, 1947, the Commissioner, Immigration and Naturalization Service, ordered that Willumeit be deported to Germany and ordered that execution of the warrant of deportation be deferred, pending final outcome of relator's petition for rehearing of the decision of the Court ordering cancellation of his United States naturalization. On May 16, 1947, the Board of Immigration Appeals affirmed the Commissioner's decision and on the same day a warrant of deportation was issued. The warrant of deportation was based on the fact that Willumeit had been found to be a [fol. 18] member of the undesirable classes of alien residents, that is, that he was an alien who had been convicted of conspiracy to violate the Espionage Act and also that at the time of entry to this country, he was not in possession of a valid unexpired immigration visa.

6. The Attorney General, by order dated June 22, 1945, ordered relator interned as a dangerous alien enemy, and on May 23, 1946, he ordered that the alien be removed from this country, since he was a dangerous alien enemy.

Wherefore, it is prayed that the writ of habeas corpus be dismissed and the alien be remanded to the custody of the Immigration and Naturalization Service.

Dated: New York, N. Y., October —, 1947.

R. A. Vielhaber.

[fol. 19] In United States District Court

Order Dismissing Writ of Habeas Corpus

The writ of habeas corpus in the above-entitled action having come on to be heard before this court on the 12th day of November, 1947, and, after hearing Herman J. Roshwald, Esq. (Joseph W. Solomon, Esq., of Counsel) for the relator, in support of the writ, and John F. X. McGohey, United States Attorney for the Southern District of New York (William J. Sexton, Assistant United States Attorney, of Counsel), in opposition thereto, and upon the

petition for the writ of habeas corpus returned thereto, and all the papers and proceedings had herein, it is

Ordered that the writ of habeas corpus be dismissed, and it is

Further ordered that the relator be remanded to the custody of the Commissioner of Immigration and Naturalization at Ellis Island, New York Harbor, New York.

Dated: New York, New York, December 17, 1947.

(Sgd.) Alfred C. Coxe, U. S. D. J.

[fol. 20] In United States District Court

Notice of Appeal

Notice is hereby given that the United States of America, Ex Rel Otto Albert Willumeit, the above-named relator, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the Order denying and Dismissing the Petition for Writ of Habeas Corpus entered in this action on the 17 day of December, A. D., 1947.

(s.) Herman J. Roshwadl, (s.) Joseph W. Solomon; of Counsel, Attorneys for Relators, 320 Broadway, New York 7, New York, Telephone: WOrth 2-3523.

[fol. 21] In United States District Court

Affidavit of No Opinion

State of New York,
County of New York, ss.:

Eugene H. Nickerson, being duly sworn, deposes and says:

I have checked the records in the Office of the Clerk of the United States District Court for the Southern District of New York in the case of United States of America, ex rel. Otto A. Willumeit v. W. F. Watkins, * * * Immigration and Naturalization Service, or whosoever may have custody of Otto A. Willumeit, etc.

On information and belief no opinion was rendered by the District Court in dismissing the writ of habeas corpus.

Eugene H. Nickerson.

Sworn to before me this 19 day of November 1948. James G. Grady, Notary Public in the State of New York, Residing in New York County. (SEAL.)

[fol. 22] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein that the Central Office file of the Immigration and Naturalization Service affecting relator-appellant herein, which was furnished to the District Court as an Exhibit in the course of argument of this proceeding, need not be reproduced as a part of this record on appeal herein, but it will be handed up as an Exhibit on the argument of the appeal herein.

Dated: New York, November 22, 1948.

Eugene H. Nickerson, Attorney for relator-appellant,
John F. X. McGohey, Attorney for respondents-appellees.

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted.]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true copy of the Transcript of Record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated: New York, November 22, 1948.

Eugene H. Nickerson, Attorney for relator-appellant,
John F. X. McGohey, Attorney for respondents-appellees.

[fol. 24] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 25] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT—OCTOBER TERM, 1948

No. 123

(Argued December 8, 1948 Decided January 3, 1949.)

Docket No. 21184

UNITED STATES OF AMERICA, ex rel. OTTO A. WILLUMEIT, Relator-Appellant,

v.

W. F. WATKINS, District Director, Immigration and Naturalization Service, or whosoever may have custody of OTTO A. WILLUMEIT, etc., Respondent-Appellee

Before: Swan, Augustus N. Hand and Clark, Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York

Habeas corpus proceedings wherein an order was entered dismissing the writ. The relator has appealed. Affirmed.

Eugene H. Nickerson, Attorney for appellant.

John F. X. McGohey, United States Attorney, for appellee; Harold J. Raby, Assistant United States Attorney, of counsel.

OPINION

[fol. 26] Swan, Circuit Judge:

This is an appeal by the relator from an order dismissing a writ of habeas corpus. He is in the custody of the respondent under two orders: one, an order of the Attorney General, dated May 23, 1946, ordering his removal from the United States as an alien enemy; the other a warrant of deportation, dated May 16, 1947 directing that he be deported to Germany.

From the amended petition for the writ, the return thereto and the record of the proceedings before officials of the Immigration Service, the following facts appear: The relator was born in 1905 in Lorraine, then a part of Germany.

He came to the United States in 1925, on a German passport, as a quota immigrant charged to the French quota. In 1931 he was naturalized as a United States citizen by a decree of the Superior Court of Lake County, Indiana. In 1941 he crossed the border from El Paso, Texas, to Juarez, Mexico, and was allowed to re-enter three hours later upon showing his certificate of United States citizenship. In 1942 he pleaded guilty to an indictment charging violation of 50 U. S. C. §34 and was sentenced to imprisonment for five years. While serving this sentence a decree was entered against him with his consent in the United States District Court for the Northern District of Illinois cancelling his certificate of naturalization on the ground that it had been obtained through fraud in that he never intended to renounce allegiance to the German Reich. He was released from imprisonment in April 1946. The following month the Attorney General ordered his removal from the United States as a dangerous alien enemy, pursuant to 50 U. S. C. §21 and Presidential Proclamation No. 2655, 59 Stat. Part 2, 879. Thereafter, in October 1946, deportation proceedings were instituted against the relator, which resulted in the issuance of a warrant under date of May 16, [fol. 27] 1947, directing his deportation on two grounds: (1) that he was deportable under 8 U. S. C. A. §214 because at the time of his entry from Mexico in 1941 he was an immigrant not in possession of a valid immigration visa as required by 8 U. S. C. A. §213; and (2) that he was deportable under 8 U. S. C. A. §157 because of his conviction in 1942 of violating 50 U. S. C. §34. The writ of habeas corpus was sued out in June 1947 and was dismissed in November 1947 without opinion.

Because of the appellant's poverty the court obtained through The Legal Aid Society the services of an attorney to present his case on appeal, and we wish to express our appreciation of the highly competent and helpful manner in which Mr. Nickerson has performed this gratuitous public service.

It is urged that the appellant cannot be removed as an alien enemy because he falls within none of the categories specified in the Alien Enemy Act, 50 U. S. C. §21, namely, "natives, citizens, denizens, or subjects of the hostile nation * * *" Concededly he must be considered a "native" of France. *United States ex rel. Gregoire* v. *Watkins*, 2 Cir., 164 F. 2d 137. Whether the cancellation of his naturaliza-

tion caused him to become again a "citizen" or a "subject" of Germany would turn upon German law, which was alleged but no proof of which was offered. But a determination of this issue is not essential if the appellant is deportable upon either of the grounds stated in the warrant of deportation.

The first ground for deportation, namely, that the appellant's entry from Mexico in 1941 was illegal because the cancellation in 1944 of the 1931 decree granting him citizenship requires that that decree be deemed to have been always a nullity so that he must be considered to have been at all times an alien rather than a United States citizen, [fol. 28] seems highly doubtful;[1] but this issue also need not be decided in view of our conclusion as to the other ground for deportation.

The other ground is the Act of May 10, 1920 which now appears as 8 U. S. C. A. §157. This provides that "All aliens who since August 1, 1914 have been or may hereafter be convicted" of violating 50 U. S. C. §34, among other specified statutes, may be deported "if the Attorney General, after hearing, finds that such aliens are undesirable residents of the United States." At the time of the hearing before the immigration officials who found the appellant to be an undesirable resident, he was an alien by reason of the cancellation of his certificate of naturalization, although at the time of his conviction under 50 U. S. C. §34 he was a naturalized citizen. This is precisely the same situation as this court passed upon in *United States ex rel. Eichenlaub* v. *Watkins*, 167 F. 2d. 659, and in that case certiorari was denied November 15, 1948. The appellant asks us to reconsider the *Eichenlaub* decision and makes a cogent argument to prove that we were in error in construing § 157 to authorize the deportation of an alien who was a naturalized citizen when he committed the crime which rendered him an "undesirable resident." But our construction of the statute was not so plainly erroneous as to induce the Supreme Court to grant certiorari. Nor have we been convinced by further argument that Congress did not intend the statute to cover such cases as *Eichenlaub's* and the appellant's. The Act is concerned with the deportation of "undesirable" aliens; the appellant is an alien, and by reason of his conviction may be found to be an "undesirable

[1] See Note 6 A. L. R. 406 and cases there cited.

resident" of the United States whether he was an alien or a citizen when the crime was committed. On the authority of the *Eichenlaub* case the order is affirmed.

[fol. 29] IN UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Thomas W. Swan, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

UNITED STATES ex rel. OTTO A. WILLUMEIT, Relator-Appellant,

v.

W. F. WATKINS, District Director, etc., Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York.

JUDGMENT—Filed January 3, 1949

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 30] [File endorsement omitted]

[fol. 31] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 32] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. —

UNITED STATES, ex rel. WILLUMEIT, Petitioner,

v.

WATKINS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 28th, 1949.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

Dated this 25th day of March, 1949.

[fol. 33] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 27, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 34] UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE, PHILADELPHIA, PA.

No. 0300-46619 A-6401740

WARRANT—DEPORTATION OF ALIEN

To: District Director of Immigration and Naturalization, New York, New York. Or to any Officer or Employee of the United States Immigration and Naturalization Service.

Whereas, after due hearing before an authorized immigrant inspector, and upon the basis thereof, an order has

been duly made that the alien Otto Albert Willumeit or Otto Willumeit who entered the United States at or near El Paso, Texas, on or about Sept. 1941 is subject to deportation under the following provisions of the laws of the United States to wit: The Act of May 10, 1920, in that he has been found to be a member of the undesirable classes of alien residents enumerated in Section 1 of said Act, to wit: An alien who has been convicted of violation of U. S. C. Title 50, Section 34 (Conspiracy to violate Espionage Act, etc.); and the Immigration Act of May 26, 1924, in that, at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to deport the said alien to Germany, at the expenses of the appropriation, "Salaries and Expenses, Immigration and Naturalization Service, 1947," including the expenses of an attendant, if necessary. It is further ordered that execution of the warrant of deportation be stayed pending the final outcome of the petition for rehearing of the denaturalization proceeding.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 16th day of May, 1947.

A. R. Mackey, Chief, Exclusion and Expulsion Section.

rcp

[fol. 35] U. S. DEPARTMENT OF JUSTICE
Board of Immigration Appeals

File: A-6401740—New York
In re: Otto Albert Willumeit or Otto Willumeit
In Deportation Proceedings

In Behalf of respondent: Joseph W. Solomon, Esq.
300 Barlum Tower, Detroit, Mich.
Heard: May 1, 1947.

Charges:
Warrant: Act of 1920—Member of undesirable class
Lodged: Act of 1924—No immigration visa

Application: Suspension of deportation, voluntary departure and preexamination

Detention Status: Detained at Government expense.

Findings of Fact, Conclusions of Law and Order—May 16, 1947

Discussion: The Presiding Inspector and the Commissioner both recommend respondent's deportation on the warrant and lodged charges. Exceptions have been filed by respondent.

Respondent was born in the Province of Lorraine when that province was part of Germany. He admits that at the time of his birth he was a subject of Germany.

Respondent first came to the United States in September 1925. He was then admitted as a quota immigrant for permanent residence. On September 16, 1931 he was naturalized an American citizen. While still presumably a citizen of this country he made two trips to Germany and one brief visit to Mexico. His last entry occurred at El Paso, Texas, on October 24, 1941. In October 1942 proceedings were instituted in the United States District Court for the Northern District of Illinois to cancel respondent's naturalization on the grounds of illegality and fraud. With the consent of respondent a decree pro confesso was entered on June 9, 1944, canceling his certificate of naturalization on the grounds of fraud and illegality. Respondent did not appeal, and execution of the judgment then entered by the court was never stayed.

Recently a petition for rehearing of the denaturalization proceeding and asking that the judgment of the court cancel-

ing respondent's citizenship be set aside was filed by counsel for respondent. Because of that pending petition counsel contends that respondent should still be considered an American citizen. We see no merit in this contention. The court decree was entered pro confesso. No appeal was taken, and execution of the final judgment was never stayed. So far as we are concerned, that decree of the court is [fol. 36] binding upon us; until set aside or revoked by a court of competent jurisdiction, we must find that respondent is an alien.

Respondent contends that if he is not an American citizen, he is now stateless. The Commissioner found, on the basis of our treaty of peace with Germany after the First World War that respondent had never lost his German citizenship. Whether or not respondent is a national of Germany is, in the final analysis, a question of German law. The determination of foreign law is always a question of fact which must be established through evidence made part of the record. There is insufficient evidence before us at this time to find that respondent is a national of Germany. Nor is it necessary at this time to reopen the hearing and establish this fact, since a finding can be made, as we shall show below, as to the place of respondent's deportation without the necessity of now determining his nationality.

The denaturalization of the respondent on the ground of fraud was, in effect, a finding that he had never been an American citizen and had always been an alien. See *Johannessen* v. *United States*, 225 U. S. 227 (1912); *Luria* v. *United States*, 231 U. S. 9 (1913); *Rosenberg* v. *United States*, 60 F. (2d) 475 (C. C. A. 3, 1932), cert. den., 287 U. S. 645 (1932). At the time of his last entry on October 24, 1941, he should have been documented as an alien immigrant. He was not so documented. He did not present an immigration visa. The charge lodged at the hearing is sustained.

The warrant charge is laid under that portion of the Act of May 10, 1920 which provides for the deportation of all aliens, found by the Attorney General to be undesirable residents of the United States, "who since August 1, 1914 have been or may hereafter be convicted of any violation or conspiracy to violate any of the following acts or portion of acts, the judgment on such conviction having become final, namely: (a) an Act entitled 'an act to punish acts of interference with foreign relations, the neutrality,

and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917 or the amendment thereof approved May 16, 1918."

Respondent in August 1942 was convicted in the United States District Court for the District of Connecticut on his plea of guilty, of violating Section 4 of the Act approved June 15, 1917 (50 U. S. C. 34) in that he conspired with others to violate Section 2 of that Act. On August 21, 1942 respondent was sentenced to imprisonment for 5 years. No appeal was taken and no stay of execution of judgment was granted. Respondent was released from imprisonment in April 1946.

[fol. 37] Counsel for respondent now contends that the judgment on respondent's conviction of conspiring to violate Section 2 of the Act of June 15, 1917, has not become final. Apparently counsel intends to petition the District Court in Connecticut for a rehearing just as he already has in the denaturalization case. What we said in connection with the finality of the denaturalization decree applies here also. We think that counsel's contention is without merit. The judgment of conviction has long since become final. Until set aside by a court of competent jurisdiction, we cannot hold that the judgment has not become final.

Counsel has also excepted to the finding that respondent is an undesirable resident of the United States, a jurisdictional finding that must be made before deportation can be ordered under the Act of May 10, 1920. *Mahler* v. *Eby*, 264 U. S. 32 (1924). We think that counsel's exception is also without merit. Respondent's conviction under the Act of June 15, 1917 is by itself enough to justify us in finding respondent to be an undesirable resident of the United States. *Mahler* v. *Eby*, supra. If additional evidence were necessary, and we do not think it is, this record contains ample evidence upon which a finding of undesirability can be made.[1] There is undisputed evidence in this

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[1] We need not and do not consider respondent's indictment and conviction in the Southern District of New York of conspiring to counsel persons to refuse to serve in the armed forces of the United States, a conviction that was set aside by the United States Supreme Court (*Keegan* v.

record that respondent was a member of the German-American Bund from September 1937 until its dissolution in December 1941. From 1939 on Respondent was the Chicago unit leader of this un-American organization. In January 1945 the Attorney General found respondent to be potentially dangerous to the security of this country and ordered his internment. On May 23, 1946 the Attorney General directed respondent's removal from the United States. We find that respondent is an undesirable resident of the United States.

As we said above, we cannot determine from this record respondent's present nationality; but it is clear that prior to establishing his residence in the United States, respondent's home was in Germany. In accordance with Section 20 of the Act of February 5, 1917 deportation can and will be directed to Germany. If that country refuses to accept respondent as a deportee, further consideration will be given to reopening the hearing to obtain evidence as to his nationality.

FINDINGS OF FACT

Upon the basis of all the evidence presented, it is found:

[fol. 38] (1) That respondent is a native of Germany and was a German national at birth;

(2) That respondent was naturalized in 1931;

(3) That in June 1944 the United States District Court for the Northern District of Illinois canceled respondent's naturalization on the ground that it had been obtained by fraud and illegality;

(4) That in August 1942 respondent was convicted of violating Section 4 of the Act approved June 15, 1917, in that he conspired with others to violate Section 2 of that Act;

(5) That no appeal was taken by respondent nor was execution of the judgment ever stayed;

United States, 325 U. S. 478), as having any importance in determining whether respondent is an undesirable resident. Nor do we think the opinion of the Supreme Court in the *Keegan* case has any probative value in this proceeding.

(6) That respondent was sentenced to serve 5 years and actually was imprisoned until April 1946;

(7) That respondent is an undesirable resident of the United States;

(8) That respondent last entered the United States at El Paso, Texas, on October 24, 1941;

(9) That respondent was not then in possession of an immigration visa;

(10) That respondent, before establishing his residence in the United States, lived in Germany.

Conclusions of Law: Upon the basis of the foregoing findings of fact, it is included:

(1) That under the Act of May 10, 1920, respondent is subject to deportation in that he is found to be an undesirable resident of the United States and has since August 1, 1914, been convicted, the judgment of such conviction having become final, of conspiracy to violate part of the act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917, as amended;

[fol. 39] (2) That under Sections 13 and 14 of the Immigration Act of May 26, 1924, the respondent is subject to deportation in that at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder;

3. That under Section 20 of the Immigration Act of February 5, 1917, the respondent is deportable to Germany, at Government expense.

Other Factors: Respondent has applied for suspension of deportation or alternatively, for voluntary departure and precxamination. He is married to a former national of Germany who is apparently a lawful resident of the United States. She is also in detention as a dangerous alien enemy. There are no children as issue of the marriage.

Respondent is occupationally a physician. He claims that he has property in the United States valued at about

$45,000. This property has been vested by the Alien Property Custodian.

We do not think that respondent should be granted any form of discretionary relief. However, we note that respondent's counsel momentarily expects a decision on the petition for a rehearing of the denaturalization case. Because of this fact we shall stay execution of the order of deportation to be entered herein until such time as this litigation is finally completed.

ORDER: It is ordered that the alien be deported to Germany at Government expense upon the charge contained in the warrant of arrest and on the charge lodged at the hearing.

It is further ordered that execution of the warrant of deportation be stayed pending the final outcome of the petition for rehearing of the denaturalization proceeding.

Thos. G. Finucane, Chairman.

MW:BPF

[fol. 40] U. S. DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File: A 6401740—New York (0300-46619).
In re: Otto Albert Willumeit or Otto Willumeit.

In Deportation Proceedings

In behalf of Respondent: Joseph W. Solomon, Esquire, 3000 Barlum Tower, Detroit 26, Michigan. Oral argument requested.

Charges: Warrant: Act of 1920—Member of undesirable class. Lodged: Act of 1924—No immigration visa.

Application: Suspension of deportation, voluntary departure and preexamination.

Detention Status: Detained at government expense.

FINDINGS AND ORDER OF COMMISSIONER—April 22, 1947

Upon consideration of the entire record, the findings of fact and conclusions of law proposed by the Presiding Inspector and served on the alien's attorney on March 13, 1947, are hereby adopted.

Discussion: This record relates to an alien, native and citizen of Germany, age 42, who testified that he last entered the United States on or about October 24, 1941 at El Paso,

Texas by automobile from Mexico, at which time he was admitted as a citizen of the United States upon showing his citizenship certificate. He further testified that he was not then in possession of an immigration visa or document in lieu thereof (p. 26).

The respondent was lawfully admitted to the United States for permanent residence at the port of New York ex SS "President Harding" on September 25, 1925 (Ex. 5). He was naturalized in the Superior Court, Lake County, Indiana on September 16, 1931. He testified that he left the United States about October 1933 and returned at New York about June 1935; that he left about September of 1935 and returned about June 1936. He states that he was admitted upon both of his returns as a United States citizen in possession of an American passport.

The respondent's naturalization was canceled in the [fol. 41] United States District Court for the Northern District of Illinois, Eastern Division, on June 9, 1944, nunc pro tunc as of May 23, 1944. The court, in cancelling the naturalization, found "that the defendant on September 16, 1931 fraudulently and illegally procured his certificate of citizenship by false representations and that the renunciation of allegiance to Germany and the oath of allegiance to the United States of America purportedly made by the said Otto Albert Willumeit in connection with naturalization, were false and fraudulent in that he never intended to renounce absolutely and forever all allegiance and fidelity to the German Reich, of which he was then a subject and he did not intend to support the constitution and laws of the United States of America against all enemies, foreign and domestic, and he did not intend to bear true faith and allegiance to the same, but actually intended to remain a subject of the German Reich and maintain his allegiance thereto; that said certificate of naturalization is subject to cancellation". The naturalization was declared "null and void" and the "defendant Otto Albert Willumeit is hereby forever restrained and enjoined from setting up or claiming any rights or privileges, benefits or advantages whatsoever under said order, entered on, to wit: September 16, 1931, by the Lake Superior Court of Lake County, Indiana, as aforesaid, or the certificate of citizenship issued by virtue of said order".

The warrant hearing in this case was begun October 14, 1946 and resumed October 16, 1946 notwithstanding the

alien's contention that he had not been granted sufficient time to have his attorney present. He consequently refused to answer the questions during the hearing. His preliminary statements and Exhibits 1 to 11 inclusive were introduced and the hearing closed and the record submitted. The Service on November 25, 1946 ordered the hearing reopened to give the alien ten days to make arrangements for representation by counsel if he so desired, and to introduce direct evidence showing whether the judgment for his conviction of conspiracy to violate the Espionage Act had become final.

The reopened hearing was held on January 9 and 10, 1947 and counsel was present. The attorney permitted the respondent to testify, subject to an objection to the jurisdiction of this Service on the ground that the respondent was still a citizen of the United States, inasmuch as he surrendered his naturalization certificate under circumstances which he claims were illegal and since the respondent has a petition for rehearing of the order cancelling his [fol. 42] naturalization presently pending. It is apparent that the time for taking an appeal from the court's order cancelling the naturalization of respondent has long since expired and the decision is final unless and until the court grants a petition for rehearing and sets aside the judgment of cancellation. Counsel's contention that the judgment is not final is without merit.

The respondent testified that he had been a German citizen up to the date in 1931 when he was admitted to United States citizenship, and that he automatically lost his German citizenship, pursuant to German law, upon acquiring United States citizenship, and his United States citizenship having been cancelled, he is now stateless (p. 27). Counsel stipulated the submission, in support of respondent's claim, of a text reference summarizing German law on the subject of nationality. However, such exhibit, #15, was not submitted. Exhibit 14 is certified true extract copy of Article 1 of the Treaty with Germany of August 25, 1921 and also Article 278 of the Treaty of Versailles. Article 278 provides that Germany undertakes to renounce any new nationality which has been or may be acquired by her nationals under the laws of the allied and associated powers and in accordance with the decisions of the competent authorities of those powers pursuant to naturalization laws or under

treaty stipulations, and to regard such persons as having in consequence of the acquisition of such new nationality, in all respects severed their allegiance to their country of origin. Since a competent United States court has determined in effect that in contemplation of law respondent is considered never to have been a United States citizen and never to have renounced his former allegiance in the naturalization process, the German authorities are bound by the determination of the United States Court to consider that the respondent's act of expatriation in the 1931 naturalization process was null and void and that he is a German citizen (p. 27).

The respondent is charged in the warrant of arrest with being subject to deportation under the Act of May 10, 1920 in that he has been found to be a member of the undesirable classes of alien residents enumerated in Section 1 of said Act, to wit: an alien who has been convicted of violation of U. S. C. Title 50, Section 34 (conspiracy to violate Espionage Act, etc.).

The pertinent portion of the Act of May 10, 1920 provides "that aliens of the following classes, in addition to those for whose explusion from the United States provision is made in the existing law, shall, upon the warrant of the Attorney General, be taken into his custody and deported [fol. 43] in the manner provided in Section 19 and 20 of the Act of February 5, 1917, * * *, if the Attorney General, after hearing, finds that such aliens are undesirable residents of the United States, to wit: (2) all aliens who since August 1, 1914 have been or may hereafter be convicted of any violation * or conspiracy to violate any of the following acts or portion of acts, the judgment on such conviction having become final, namely: (a) an Act entitled 'an act to punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917 or the amendment thereof approved May 16, 1918".*

Exhibit #7 is court record of indictment, conviction and sentence of the respondent in the District Court of the United States for the District of Connecticut, for violating the provisions of Section 34, Title 50, U. S. C. (Conspiracy to violate Espionage Act, etc., Section 32, Title 50 U. S. C.).

The indictment charges that the conspiracy occurred continuously from on or about January 1, 1941 to on or about December 6, 1941. The defendant was convicted on his plea of guilty August 21, 1942 and sentenced to five years imprisonment. The details of the conspiracy and the overt acts are set forth in the indictment (Ex. 7). The respondent was asked whether he had any comment to make with respect to his conviction for violation of Title 50, U. S. C., Section 34, the basis for the deportation charge, and he testified that he had been induced by deception to make a plea of guilty and maintained that he was not in fact guilty. It is not permissible to go behind the record of his conviction to consider such contention of the alien.

With reference to whether the judgment of conviction has become "final", a letter was sent to the clerk of the court in which this conviction occurred, requesting that a certified true copy of the docket entry with respect to the respondent's conviction be furnished, to establish whether an appeal had been taken. The clerk of the court replied stating that "our docket shows that on August 21 of 1942 this defendant was sentenced by Judge Smith to five years in custody of the Attorney General for imprisonment, judgment issued and was returned showing confinement on August 21, 1942 at Federal Correctional Institution, Danbury, Connecticut. Time for appeal has apparently long since expired" (Ex. 16). A certified true copy of the rule governing appeals in the United States District Court proceedings was introduced as Exhibit 17, which corroborates the clerk's statement as to expiration of the time for appeal. [fol. 44] The attorney takes exception to the conclusion that the judgment of conviction is final and in support of his claim that a rehearing may be granted by the court after the time specified in the rule for an appeal, introduced a court memorandum on petition for rehearing in the case of Hans Geisler, Civil Action No. 4650 (Ex. 18). It appears, however, that there is a distinction between an appeal and a petition for rehearing. The attorney contends that the judgment is not final because it is respondent's intention to file a motion to reopen the case. It is believed that the time of making an appeal having expired, the judgment of conviction is at the present time "final" within the meaning of the use of the term in the Act of May 10, 1920, notwithstanding the intention to petition for reopening.

In order to render an alien subject to deportation on the charge, it is necessary that the Attorney General after hearing find that the alien is an undesirable resident of the United States. The Attorney General on June 22, 1945 ordered that the respondent be interned as an alien enemy potentially dangerous to the public peace and safety of the United States. (Ex. 11). He was given a hearing before a repatriation hearing board, at his request, on May 7, 1946, and the Attorney General deeming "said alien enemy to be dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principles thereof", ordered on May 23, 1946 that "in the event the said alien fails or neglects to depart from the United States within the said thirty days, the Commissioner of Immigration and Naturalization is directed to provide for the alien's removal to Germany.

An indictment was filed in the United States District Court, Southern District of New York on July 7, 1942, charging the respondent, with others, with conspiracy, beginning about January 1, 1940 and continuing up to and including the date of the filing of the indictment, in violation of Title 50, U. S. C. A., Section 311 and 11 of the Selective Training and Service Act (conspiracy to counsel persons to refuse to serve in land and naval forces of the United States). The court on October 21, 1942 ordered the respondent sentenced, upon his conviction, to five years imprisonment (Ex. 9). However, the conviction was reversed by the Supreme Court (*Keegan et al* v. *United States*, 325 U. S. 478 (p. 13)).

[fol. 45] The respondent testified that he had been a member of the German American Bund from about September of 1937 until December of 1941, when the organization was dissolved, and that from 1939 until the date of dissolution he had been Chicago Unit Leader of the Bund. He testified that he did not participate in the issuance, but did participate in the dissemination of the Bund Command (Bundeshefehle #37), which had been the principal basis for his trial for violation of Title 50, U. S. C., Sections 311 and 11 of the Selective Service Act.

The Supreme Court in commenting upon the nature and purposes of the Bund pointed out that it was organized on the Fuehrer or leadership principle; that the president was

the leader and his order was law unless and until modified or abrogated by a convention; that members were expected to obey his orders; that "speeches and literature justify the inference that the Bund endorsed the Nazi movement in Germany, and if it did not actually advocate some such form of government in this country at least it assayed to create public opinion favorable to the Hitler regime and to the German National Socialist State. There is also much to the effect that the Bund is pursuing lawful aims within the constitutional rights of its members, and that its activities need not be hidden from governmental agencies. There is basis for suspicion of subversive conduct: there is matter offensive to one's sense of loyalty to our government's policies".

Upon the basis of the evidence adduced in the hearing, it is shown that respondent's naturalization was canceled on the ground that he at the time of his naturalization in 1931 did not truly renounce his allegiance to the German Reich; that he was convicted for conspiracy to violate the Espionage Act, as related in the indictment upon which he was convicted; that he was ordered interned by the Attorney General as an alien enemy potentially dangerous to the public peace and safety of the United States and subsequently upon hearing was deemed by the Attorney General to be dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principles thereof, and ordered to be removed to Germany by this Service; that respondent was a member of the German American Bund from September 1937 until December 1941 and was Chicago Unit Leader of the Bund from 1939 until December 1941; that respondent's membership in such organization supplies basis for suspicion of subversive or other conduct offensive [fol. 46] to a sense of loyalty to the policies of the United States. This evidence of record sustains a finding that the subject alien is an undesirable resident of the United States. The charge contained in the warrant of arrest is sustained.

The attorney contends in his brief that the circumstances of the respondent's pleading guilty were prejudicial and unfair; that the United States Attorney felt sufficiently interested in the merits of the defendant's position to speak in his behalf to the trial judge, and submitted copy of statement of the court and counsel at the imposition of sentence (Ex. 21). The court in such statement said that the defend-

ant did lend himself to the conspiracy and that a substantial sentence was indicated. As above stated, we cannot go behind the judgment of conviction.

There remains for determination the lodged charge that the respondent was an immigrant not in possession of an unexpired immigration visa at the time of his last entry at El Paso, Texas about October 24, 1941. The cancellation of respondent's naturalization had retroactive effect and respondent never having been a United States citizen in contemplation of law, was an alien at the time of his last entry and he did not possess an immigration visa. Inasmuch as the respondent entered the United States during the time when he was a participant in the conspiracy to violate the Espionage Act, the entry was presumably with intention to continue such conspiracy. Consequently, he is not believed to be entitled to the general waiver of documentary requirements granted by the Department of State in the cases of aliens who enter the United States illegally from contiguous territory between July 1, 1940 and December 31, 1942 after an absence to foreign contiguous territory of less than ninety days as set forth in O. I. 175.44. The lodged charge is also sustained.

The respondent applied for suspension of deportation and in the alternative, for voluntary departure and preexamination. He was married in 1933 in Chicago and he testified that his wife is stateless, she having automatically lost her German citizenship by her marriage to him at a time when he was an American citizen (p. 33). This contention appears to have no merit. There are no children (pp. 33, 34). The respondent's wife last reentered for permanent residence at Miami, Florida on February 6, 1939. She was placed in detention as an alien enemy on April 2, 1942 (p. 41) and is presently detained at Ellis Island under order [fol. 47] of the Attorney General. She testified that a repatriation order has been entered in her case, and that her appeal of the order in habeas corpus proceedings was denied. She indicated that an appeal from the denial will be filed as soon as other similar cases are disposed of (pp. 41, 42).

A finding having been made that the respondent is an undesirable resident of the United States, he would not be a proper subject for any type of discretionary relief. He will be ordered deported, with stay of execution of the warrant

of deportation pending outcome of his petition for rehearing of the decision of the court cancelling his naturalization.

Order: It is ordered that suspension of deportation, voluntary departure and preexamination be denied.

It Is Further Ordered that the alien be deported to Germany at government expense on the charges:

> That under the Act of May 10, 1920, he is found to be an undesirable resident of the United States and has, since August 1, 1914, been convicted, the judgment on such conviction having become final, of conspiracy to violate part of the Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes", approved June 15, 1917, as amended; and
>
> That under the Immigration Act of May 26, 1924, he was, at time of entry, an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder.

It Is Further Ordered that execution of the warrant of deportation be deferred pending final outcome of the respondent's petition for rehearing of the decision of the court ordering cancellation of his United States naturalization.

In accordance with 8 CFR 90.3, the case is referred to the Board of Immigration Appeals for consideration.

Recommended.

Ilga Carusi, Commissioner.

Joseph Savoretti, Assistant Commissioner.

GWS.

TLM/ff.

[fol. 48] EXHIBIT No. 4

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 4713

UNITED STATES OF AMERICA

vs.

OTTO ALBERT WILLUMEIT

FINAL DECREE

The above entitled cause coming on for hearing in the trial on the merits of the issues herein on the 23rd day of May, A. D. 1944, upon the complaint of the United States of America to cancel the citizenship heretofore issued to Otto Albert Willumeit, defendant herein, and upon the written appearance of Otto Albert Willumeit in his own proper person and by the appearance of Joseph T. Harrington, counsel for Otto Albert Willumeit, and the plaintiff having offered to introduce evidence and testimony of witnesses duly sworn in support of the allegations of said complaint, and the defendant and his counsel having been present in open court, and the defendant and his counsel having stated to the court that it was the desire of the defendant not to contest the issues raised in the complaint of the United States, and the defendant having stated to the court that he now desires to surrender his certificate of citizenship to the court, and the court having heard the evidence and arguments of counsel, and being fully advised in the premises, finds the issues herein in favor of the plaintiff, and that said plaintiff is entitled to a decree [fol. 49] as prayed for in its said complaint.

And the court further finds that the plaintiff, the United States of America, filed its complaint on October 1, 1942, and on October 10, 1942, the United States Marshal returned a summons stating that the defendant was not found in the District. The court further finds that on January 13, 1943, an affidavit for publication was filed, and on January 18, 1943, a certificate of mailing was filed, and on January 20, 1943, a certificate of mailing notice was filed; that on January 26, 1943, a return receipt notice mailed was filed; that on February 2, 1943, a certificate of publication

from Law Bulletin was filed; that on February 15, 1943, on motion of plaintiff an order was granted giving leave to the plaintiff to take depositions on oral interrogatories of Vagn G. Callen, Carl E. Weiler, and Victor Ridder; that on March 10, 1943, the United States Attorney filed a petition to issue writ of Habeas Corpus Ad Testificandum; that on March 15, 1943, the court heard the statement of the defendant herein in open court that he had delivered to the Warden of Federal Detention Headquarters in New York City, New York, under date of March 10, 1943, the original of his answer to the complaint herein with a request to forward the same to the Clerk of this Court for filing, and the same not having been received by the clerk, it was ordered that leave be and was given to the defendant to file copy of said answer instanter, and the hearing on the writ of Habeas Corpus Ad Testificandum was thereupon continued to March 22, 1943; that on March 15, 1943, there was filed copy of the answer of the defendant; that on April 5, 1943, the Court ordered this case consolidated for trial for the purpose of hearing evidence from the plaintiff, and from all of the defendants, as to the organization, purposes, aims and relationship, if any, to the German Reich of the German American Bund and its pred- [fol. 50] ecessor organizations; that on April 13, 1943, a notice for taking depositions pursuant to Rule 30 of Civil Procedure was filed; that on April 22, 1943, a pretrial conference was held; that on September 15, 1943, the Court found the consolidated issue in favor of the Government and further ordered that the trial as to the issue of the German American Bund be severed, and ordered the case to proceed to trial separately as to the remaining issues, and this cause was set for trial on November 18, 1943, when it was reset to January 13, 1944, when it was reset to February 25, 1944, when it was reset to March 24, 1944, when it was reset to April 10, 1944; that on March 30, 1944, an order was entered granting leave to defendant to file petition for order on plaintiff to make available to defendant books and records, and hearing on said petition was continued; that on April 10, 1944, order was entered resetting this trial to April 24, 1944, when it was again reset by agreement to May 23, 1944; that on April 24, 1944, the cause came on for hearing on motion of Joseph T. Harrington, counsel for defendant, arguments were heard and concluded, and objections of United States were

overruled, and the United States Attorney was directed to make available for inspection by defendant and his attorney in advance of the trial of this cause various books, records, papers, photos, correspondence, newspapers, pamphlets, and other personal property pursuant to the petition of Joseph T. Harrington filed on March 30, 1944, and it was further ordered that a rule issue on the defendant to prepare and file on or before May 4, 1944, a motion for production of witnesses, Gerhard Wilhelm Kunze and Wilbur V. Keegan, together with a supporting statement setting forth what the defendant expected to prove by [fol. 51] said witnesses; and it was further ordered that leave be given to Joseph T. Harrington to prepare on or before April 26, 1944, a communication directed to the defendant herein and deliver the same in a sealed envelope to the United States Attorney, who was directed to forward said communication without delay to the said defendant at the Federal Detention Headquarters, New York City, New York. The Court finds that the United States Attorney, pursuant to said order, during the period beginning May 8, 1944, to May 23, 1944, daily exhibited to Otto Albert Willumeit, in advance of the trial of this cause, various books, records, papers, photos, correspondence, newspapers, pamphlets, and other personal property, pursuant to the petition of Otto Albert Willumeit; that the said United States Attorney forwarded to the defendant Otto Albert Willumeit in a sealed envelope a communication from his counsel; that on April 26, 1944, on petition a writ of Habeas Corpus Ad Testificandum was issued returnable on May 8, 1944, for the purpose of permitting the defendant to inspect said records prior to trial; that on May 8, 1944, this cause was called for hearing and all parties were present in open court with counsel; that an order on defendant's petition for writ of Habeas Corpus Ad Testificandum was denied as to the witness Gerhard Wilhelm Kunze and as to the witness Wilbur V. Keegan was allowed and a writ was ordered issued directed to the United States Marshal to produce Wilbur V. Keegan for the trial; that on May 18, 1944, the witness Wilbur V. Keegan arrived in the Northern District of Illinois; that on that date he conferred with the Assistant United States Attorney, Francis J. McGreal, and Joseph T. Harrington, counsel for the defendant, and the defendant Otto Albert Willumeit; that on May 19, 1944, on motion of the United

States Attorney and by agreement of defendant's counsel, and defendant himself, who appeared in open court, the witness Wilbur V. Keegan was remanded to the custody of [fol. 52] the Warden of the Federal Correctional Institution at Sandstone, Minn.; that on May 18, 1944, plaintiff filed a praecipe for subpoena for William Beyer, George Oltmanns, Fred Limbach, Joseph William Haas, Karl Moeller and Oscar S. Caplan; that on May 23, 1944, this cause came on for trial and at that time the defendant made a motion to dismiss this cause for want of jurisdiction, which motion was overruled, and the defendant thereupon made a motion to continue this cause for ten years, which motion was also overruled, and when the cause was thereupon called for trial the defendant thereupon consented and agreed to the cancellation of his certificate of naturalization and for the entry of a decree pro confesso in this cause, cancelling his certificate of citizenship in accordance with the prayer of the complaint heretofore filed herein.

The Court further finds that the said defendant Albert Otto Willumeit, on, to wit, September 16, 1931, fraudulently and illegally procured his certificate of citizenship by false representations and that the renunciation of allegiance to Germany and the oath of allegiance to the United States of America purportedly made by the said Otto Albert Willumeit in connection with his naturalization were false and fraudulent in that he never intended to renounce absolutely and forever all allegiance and fidelity to The German Reich, of which he was then a subject, and he did not intend to support the Constitution and laws of the United States of America against all enemies, foreign and domestic, and he did not intend to bear true faith and allegiance to the same, but actually intended to remain a subject of The German Reich and maintain his allegiance thereto; and that said certificate of naturalization is subject to cancellation.

It is therefore ordered adjudged and decreed that the said complaint of the plaintiff and the allegations therein [fol. 53] contained against the said defendant are true.

It is further ordered, adjudged and decreed that the final order entered by the Lake Superior Court of Lake County Indiana, on September 16, 1931, admitting the said Otto Albert Willumeit as a citizen of the United States of Amer-

ica, be and the same is hereby vacated, annulled and set aside, and that the certificate of citizenship, Number 3473383 issued by virtue of said order on September 16, 1931, be and the same is hereby cancelled and declared null and void, and that said certificate of citizenship be and the same is hereby ordered surrendered by the said defendant to the Clerk of this Court, and when so surrendered the Clerk of this Court is hereby ordered to mark the said certificate cancelled, and the defendant Otto Albert Willumeit is hereby forever restrained and enjoined from setting up or claiming any rights or privileges, benefits or advantages whatsoever under said order, entered on, to wit, September 16, 1931, by the Lake Superior Court of Lake County Indiana, as aforesaid, or the certificate of citizenship issued by virtue of said order.

It is further ordered, adjudged and decreed that in the event the said defendant, Otto Albert Willumeit, is not physically in possession of said certificate of naturalization, then he is hereby ordered and directed to so surrender said certificate of citizenship when, as, and if it ever comes into his possession to the Clerk of this Court, who shall thereupon take the action mentioned in the preceding paragraph hereof.

It is further ordered, adjudged and decreed that the Clerk of this Court shall forward a certified copy of this decree to the Commissioner of Immigration and Naturalization Service, Department of Justice, Philadelphia, Penn-
[fol. 54] sylvania, and to the District Director of the Immigration and Naturalization Service, Department of Justice, Chicago, Illinois, and to the Clerk of the Lake Superior Court of Lake County Indiana.

It is further ordered, adjudged and decreed that the United States of America, plaintiff, have and recover of and from the said defendant Otto Albert Willumeit the costs of this suit to be taxed.

Enter: Nunc pro tunc as of May 23, 1944.

Campbell, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

Dated at Chicago, Illinois, this 9th day of June, A. D. 1944.

[fol. 55] IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

I, Roy H. Johnson, Clerk of the District Court of the United States of America for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order made and entered in said Court on the 9th day of June, A. D. 1944, nunc pro tunc as of May 23, 1944, as fully as the same appears of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this tenth day of June, A. D. 1944.

Roy H. Johnson, Clerk. (Seal.)

[fol. 56] EXHIBIT NO. 7

C. Form No. 61 b. Judgment and Commitment

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF CONNECTICUT

No. 6763

Criminal [1] in One Counts for Violation of U. S. C., Title 50, Secs. 34

UNITED STATES

v.

OTTO WILLUMEIT

On this 21st day of August, 1942, came the United States Attorney, and the defendant Otto Willumeit appearing in proper person, and [2] with counsel and,

---

[1] Indictment or information.

[2] Insert (*a*) "by counsel" or (*b*) "having been advised of his constitutional right to counsel and having been asked whether he desired counsel assigned by the Court, replied that he did not," whichever is applicable.

The defendant having been convicted on [3] Plea of Guilty of the offense charged in the [1] indictment in the above-entitled cause, to wit:[4]

Conspiracy to violate Espionage Act, etc., and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of [5]

Sentence: 1st count. 5 years.

Probation: Under conditions of probation set forth in Probation Form 7, and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.[6]

It Is Further Ordered that [7] —.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.[8]

(Signed) J. Joseph Smith, United States District Judge.

---

[3] Insert the words "his plea of guilty," "plea of nolo contendre," or "verdict of guilty," as the case may be.

[4] Name specific offense or offenses and specify counts upon which convicted.

[5] Insert sentence and any provision for payment of fine and state whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin; that is, with reference to termination of preceding term, or with respect to any other outstanding or unserved sentence.

[6] Strike out if Court did not so order.

[7] Indicate any order with respect to suspension and probation.

The Court recommends commitment to [9] —.

A True Copy. Certified this 27th day of September, 1945. (Signed) C. E. Pickett, Clerk, by Eleanor D. Caruso, Deputy Clerk.

[fol. 56a] Defendant delivered on August 21, 1942 to Federal Correctional Institution at Danbury, Conn., the institution designated by the Attorney General, together with certified copy of the within Judgment and Commitment.

Expense $11.76.

Bernard Fitch, U. S. Marshal, by —— ——, Deputy.

Filed —— ——, Clerk, U. S. District Court, Sep. 1, 1942, A. M., New Haven, Conn.

[fol. 57] EXHIBIT No. 11

D. J. File No. 146-13-2-23-211

In the Matter of OTTO A. WILLUMEIT, Alien Enemy

ORDER

Whereas, Otto A. Willumeit, of Chicago, Illinois, a native of Germany, over the age of fourteen years, is within the United States and not a naturalized citizen thereof and has heretofore been apprehended as being potentially dangerous to the public peace and safety of the United States; and,

Whereas, it appears from all the evidence before me that said alien enemy should be interned; Now, Therefore, upon consideration thereof,

It Is Ordered that said alien enemy be interned.

(Signed) Francis Biddle, Attorney General.

Dated June 22, 1945.

---

[8] Certified copy to accompany defendant to institution.

[9] For use of Court wishing to recommend a particular institution.

[fol. 58] EXHIBIT No. 12

D. J. File No. 146-13-2-23-211

In the Matter of OTTO A. WILLUMEIT, Alien Enemy

ORDER

Whereas, Otto A. Willumeit, is a German alien enemy over the age of fourteen years who has heretofore been interned by order of the Attorney General dated June 22, 1945; and,

Whereas, the said alien enemy was, at his request, accorded a full hearing before a Repatriation Hearing Board on the issue of his removal from the United States; and,

Whereas, upon consideration of the evidence presented before the Repatriation Hearing Board on May 7, 1946, I deem said alien enemy to be dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principles thereof; Now, Therefore,

It Is Further Ordered that, in the event the said alien enemy fails or neglects to depart from the United States within the said thirty days, the Commissioner of Immigration and Naturalization is directed to provide for the alien's removal to Germany.

(Signed) Tom C. Clark, Attorney General.

Dated, Washington, D. C., May 23, 1946.

True Copy.

[fol. 59] EXHIBIT No. 16-B

UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

Office of the Clerk, Post Office Building, New Haven 5

Charles Elliott Pickett, Clerk

Nov. 29, 1946.

District Director of Immigration and Naturalization, 107 West 62nd Street, New York 23, N. Y.

DEAR SIRS:

This is in answer to your letter of November 27, 1946—No. 0300—46619 H U concerning one Otto Albert Willumeit, No. 6763 Criminal.

Our docket shows that on Aug. 21, 1942 this defendant was sentenced by Judge Smith to five years in custody of the Attorney General for imprisonment. Judgment issued and was returned showing confinement on Aug. 21, 1942 at Federal Correctional Institution, Danbury, Connecticut. Time for appeal has apparently long since expired.

Yours very truly, C. E. Pickett, Clerk.

[fol. 60] EXHIBIT No. 21

Statements of the Court and Counsel at the Imposition of Sentence

Mr. Dodd: Now your Honor, we come to the last of these defendants, Dr. Otto Willumeit. And I should say to the Court at the outset that of all of them Dr. Willumeit is certainly the best. He has some character. He apparently comes from a very fine family. His grandfather fought with the Union army as I understand it as a surgeon over here for quite some time. His father was a postmaster general of Germany, not the same thing as our Postmaster General here, he tells me. I understand there are about five of them. But he was one of the five over an area of some size.

He was educated in Germany. He came to this country, was married, has been a citizen for some time.

This I can say about Dr. Willumeit, that as far as I know he did not lie to us, nor did he lie on the witness stand. I think he told the truth, what he insists is the truth, and we do not know that it is any different, and we accept it. At least we have no reason for disbelieving him, your Honor, for not believing him. We think he told the truth. We don't know that he told us all that he knew about it. It has been our belief, after having gone into this thing pretty thoroughly with him, that he was more or less caught in it without perhaps intending to go as far as the others went.

From the day he was up here, excepting a few moments in the United States Attorney's office, or we don't think he did . . . he has told us since that he just didn't remember. And that may be so. But excepting for those first few hours I think he did tell us the truth as far as we are able to question him with what he had at hand. And he testified for the Government in this case honestly about the conversation in Chicago. And he told us that it was Kunze who first men-

tioned the name of Molzahn because he was there and heard it. And even when he was brought in here again by the defense I think he told the truth.

[fol. 61] He is a young man. And I understand he is married to a woman of intelligence and honor who is herself interned, by the way, as a dangerous enemy alien. But I think that is largely due to his position as the Chicago leader of the Bund because her internment took place before he was involved in this case. I have a feeling, your Honor, that Dr. Willumeit can be restored to decent citizenship in this country. I think he has something that he can give to America.

I wouldn't want to see him suffer too much. I have talked with him personally. Mr. Cooney has talked with him at great length. And I might tell the Court that Mr. Cooney has developed quite an affection for Dr. Willumeit, and he has asked me to say to the Court that he feels that he is the type of man that something can be done for.

I agreed to make no recommendation. He was the one defendant who never asked for anything. I made no promise to him at any time about sentence. He was the only one.

And you will recall that the defense in the Molzahn case thought, because he testified for us, he must be getting something pretty good. I never promised this man and his lawyer anything and never told them I would make a recommendation. And he never asked for it.

That has been his attitude throughout, or it was soon after he was indicted. And he said, "I will try to tell you the truth and do what I can to help you."

I think, your Honor, he should be leniently dealt with, as leniently as the Court can deal with a man in this predicament at this time. Vonsiatsky got five years. There was that mental difficulty there. I do not know what to recommend to this Court in this case, but I would say that the Government would view a lenient sentence as a just sentence under all the circumstances. We think something can be done with this man. We do not think he is a bad man at [fol. 62] heart, your Honor. We think he is probably a good man who got in with bad company and got in with this trouble.

Further, Mr. Cooney just reminds me that we believed this defendant thought Kunze had abandoned this conspiracy and was going to stay in this country, and there is some reason for believing he wanted it abandoned.

I say to your Honor I am not his lawyer. I am supposed to be hard with him, I guess, if I believe in it. But in this case I do not feel that this man is a bad actor. I think there is a place for Dr. Willumeit in America in time, and he may become a most useful citizen.

Mr. Gideon: (Defendant's counsel) . . .

Mr. Dood: I might say to your Honor, that it is our hope, although I know you can't control it, that he will not be confined in one of the larger federal penitentiaries where these other men may be. But I think that is something we probably can take up later.

I would say that I really feel myself that this man is different. His participation was slight, and I don't say these things, as you know, unless I believe them. I would like to see him get a break; I think he deserves it. I think he has something in him and I think something can be done with him.

The Court: He apparently has been an opportunist and may not have had any deep convictions, so far as the Nazi ideas were concerned, in taking part in this conspiracy. But he did lend himself to it, and the Court feels that a substantial sentence is indicated in this case and will sentence him to imprisonment for a term of five years.

[fol. 63] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 82

STIPULATION AS TO PRINTING OF RECORD—Filed August 29, 1949

It Is Stipulated and Agreed that the following portions of the immigration file which is a part of the original record in this Court shall be printed: (1) Warrant of deportation, dated May 16, 1947; (2) Findings of Fact and Order of Board of Immigration Appeals, dated May 16, 1947; (3) Findings and Order of the Commissioner of Immigration, dated April 22, 1947; (4) the following Exhibits in evidence at the Hearing before the Presiding Inspector on January 9 and 10, 1947: Exhibit 4 (Final Decree of Denaturalization in 1944); Exhibit 7, (Copy of Judgment of Conviction and

commital of petitioner in the District Court for Connecticut in 1942); and Exhibits 11, 12, 16 B and 21.

Eugene H. Nickerson, Counsel for Petitioner; Philip B. Perlman, Solicitor General, Counsel for Respondent.

August 15, 1949.

[fol. 64] [File endorsement omitted.]

Endorsed on Cover: Enter William Dean Embree. File No. 53,819. U. S. Court of Appeals, Second Circuit. Term No. 82. The United States of America, ex rel. Otto A. Willumeit, Petitioner, vs. W. F. Watkins, District Director, Immigration and Naturalization Service. Petition for a writ of certiorari and exhibit thereto. Filed May 26, 1949. Term No. 82 O. T. 1949.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 82

UNITED STATES OF AMERICA, EX REL. OTTO A. WILLUMEIT,

Petitioner,

vs.

EDWARD J. SHAUGHNESSY, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

PETITIONER'S BRIEF

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EUGENE H. NICKERSON,
For The Legal Aid Society of New York,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 82

UNITED STATES OF AMERICA, EX REL. OTTO A. WILLUMEIT,

Petitioner,

vs.

EDWARD J. SHAUGHNESSY, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. 13) is reported in 171 F. 2d 773. The District Court rendered no opinion (R. 11-12).

Jurisdiction

The judgment of the Court of Appeals was entered January 3, 1949 (R. 16). The time for filing the petition for a

writ of certiorari was extended by order dated March 25, 1949 of Mr. Justice Jackson to and including May 28, 1949 (R. 17). Certiorari was applied for May 26, 1949, and was allowed on June 27, 1949 (R. 17). The jurisdiction of this Court is invoked under 28 U. S. C. §§ 1254, 2101.

Question Presented

The question presented is whether petitioner, convicted while a naturalized citizen of a violation of 50 U. S. C. § 34, is deportable after denaturalization under the Act of May 10, 1920 (41 Stat. 593), which provides for the deportation of "aliens" who may "hereafter [after May 10, 1920] be convicted" of such a violation, among others.

Statute Involved

The statute under which the Court of Appeals held petitioner deportable is the Act of May 10, 1920 (41 Stat. 593), which, as amended, provides in pertinent part:

> "• • • aliens of the following classes • • • shall • • • be • • • deported • • • if the Attorney General, after hearing, finds that such aliens are undesirable residents of the United States, to wit:
>
> • • • • • • •
>
> "(2) All aliens who since August 1, 1914, have been *or may hereafter be* convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts, the judgment on such conviction having become final, namely: • • • [50 U. S. C. § 34, among others]." (Italics supplied.)

Statement of Facts

This proceeding was commenced in the United States District Court for the Southern District of New York by an amended petition for writ of habeas corpus (R. 4-8). Pe-

titioner is held in the custody of respondent for removal and deportation from the United States (R. 4).[1]

Petitioner was born on November 28, 1905 in Sarrebourg, Lorraine (R. 6, 19), which was at the time petitioner was interned, and still is, a part of France. In 1925 petitioner came to the United States and was admitted as a quota immigrant for permanent residence (R. 19). In the same year he made a declaration of intention to become an American citizen (R. 4). In 1931 he was admitted to United States citizenship by judgment of the Superior Court, Lake County, Indiana (R. 4, 19, 25). In 1933 he was married in Chicago and thereafter became a physician (F. Hearings of Jan. 9, 1947, p. 32).

Until 1931 petitioner had been a German citizen, but at that time, upon acquiring United States citizenship, he lost his German citizenship pursuant to German law and the Treaty between the United States and Germany signed August 26, 1921 (R. 4-5; F. Ex. 14).

In 1942 petitioner testified in the United States District Court for the District of Connecticut against various members of the German-American Bund accused of conspiracy to violate 50 U. S. C. § 34 (R. 42-44). Petitioner pleaded guilty to the same indictment (R. 38-39; 42-43).

While the personality of petitioner is not strictly relevant to the question involved in this case, it may be of interest for the Court to read the recommendations of the District Attorney at the time petitioner was brought up for sentencing in the District Court for the District of Connecticut (R. 42-44). The District Attorney said, in part:

---

[1] Since petitioner is without funds the Clerk has printed part of the record and petitioner's brief. The Central Office File of the Immigration and Naturalization Service, all of which is on file as a part of the record, has not been printed in its entirety. References to the unprinted portion of the File are designated "F."

"Now your Honor, we come to the last of these defendants, Dr. Otto Willumeit. • • •

"We think he told the truth. • • • It has been our belief, after having gone into this thing pretty thoroughly with him, that he was more or less caught in it without perhaps intending to go as far as the others went. • • •

"I have a feeling, your Honor, that Dr. Willumeit can be restored to decent citizenship in this country. I think he has something that he can give to America.

• • • • • • •

"I would say that the Government would view a lenient sentence as a just sentence under all the circumstances. We think something can be done with this man. We do not think he is a bad man at heart, your Honor. We think he is probably a good man who got in with bad company and got in with this troube.

"I say to your Honor I am not his lawyer. I am supposed to be hard with him, I guess, if I believe in it. But in this case I do not feel that this man is a bad actor. I think there is a place for Dr. Willumeit in America in time, and he may become a most useful citizen.

"I would say that I really feel myself that this man is different. His participation was slight, and I don't say these things, as you know, unless I believe them. I would like to see him get a break; I think he deserves it. I think he has something in him and I think something can be done with him."

Despite this recommendation petitioner was sentenced to five years (R. 39). While petitioner was in jail an action was commenced to cancel his naturalization certificate on the ground that he had in 1931 procured the certificate by falsely representing allegiance to the United States (R. 36). A decree was entered June 9, 1944 canceling peti-

oner's certificate of naturalization and reciting that he ad "consented and agreed" to the cancellation (R. 33-7).[2]

Thereafter, by order dated June 22, 1945, the Attorney eneral interned petitioner as a dangerous alien enemy R. 40). On May 23, 1946 the Attorney General ordered ursuant to 50 U. S. C. § 21 that petitioner be removed from ie United States to Germany (R. 41).

Soon thereafter the Government commenced still further ction against petitioner. On October 4, 1946 he was rrested again while interned at Ellis Island (F. Ex. 1) nd proceedings were held to obtain an order of deportation f petitioner pursuant to the Immigration and Naturaliza-on laws (R. 20-22; 25-27). At the conclusion of the pro-eedings a warrant of deportation, dated May 16, 1947 R. 17-18), was issued directing that petitioner be de-orted, and reciting that petitioner was deportable under ie Act of May 10, 1920 (41 Stat. 593) on the ground that e was an undesirable alien, and under the Immigration ct of May 26, 1924 (8 U. S. C. §§ 213, 214) on the ground iat he entered [in 1941, after a three hour stop in Mexico] ithout a valid immigration visa [although he then held a alid unquestioned certificate of naturalization].

Thereafter, petitioner petitioned for habeas corpus (R. -8). The writ was dismissed on the face of the petition y District Judge Coxe without opportunity for hearing vidence on behalf of petitioner and without opinion (R. 0-12).

Disposition Below

The Court of Appeals, per Swan, J. (A. N. Hand and lark, JJ also sitting) affirmed (R. 13-16, 171 F. 2d 773).

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[2] Petitioner does not concede that the decree canceling his certificate of turalization was properly entered, but the petition for *habeas corpus* w before the Court does not set forth a claim that petitioner is entitled release on that ground.

The sole ground on which the Court based its decision was that petitioner was deportable under the Act of May 10, 1940 (41 Stat. 593) providing that aliens who "since August 1, 1914 have been or *may hereafter be convicted*" of violation of 50 U. S. C. § 34, among other provisions, may be deported if found by the Attorney General to be "undesirable."

Specification of Errors to Be Urged

The Court of Appeals erred—

1. In holding that petitioner, convicted of a violation of 50 U. S. C. § 34 while a naturalized citizen, is, when later denaturalized, deportable under the Act of May 10, 1920, which provides for the deportation of "aliens" who may "hereafter [after May 10, 1920] be convicted" of such violations.

2. In affirming the dismissal of the writ of habeas corpus.

POINT I

Petitioner, Convicted as a Naturalized Citizen and Not an "Alien," Is Not Deportable under the Act of May 10, 1920, Providing for Deportation of "Aliens Who May Hereafter [After May 10, 1920] BE Convicted" for Various Violations.

The Court of Appeals affirmed upon the single ground that appellant is deportable under the Act of May 10, 1920. The Court below specifically refused to base its decision on other (and seemingly frivolous[3]) grounds advanced by the Government.

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[3] The Government's contention that petitioner, upon his return from a three-hour sojourn in Mexico in 1941 should have produced an unexpired immigration visa required of "alien" immigrants under 8 U.S.C. § 213, is hardly worth noting, inasmuch as petitioner was then and had been for ten years a naturalized citizen, was not asked to produce an immigration

The Court of Appeals held petitioner deportable under the Act of May 10, 1920, *supra*, p. 2, which provides, in short, for the deportation of "All aliens who since August 1, 1914, have been *or may hereafter be* convicted" of certain violations. That Act was passed in 1920 and speaks as of that date. As appears from its wording, the Act was designed to permit the deportation of aliens who between 1914 and the date of the Act had committed specific crimes, and the deportation also of "aliens" who "may hereafter [after May 10, 1920] be convicted" of the same crimes. The language shows that the alien must be an "alien" at the time that he "may • • • be convicted." The use of the words "aliens who may *be*" convicted indicates that the alien must "*be*" an alien at the time of conviction. There is no other grammatical possibility.

The legislative history of the Act of May 10, 1920 indicates the immediate conditions which gave rise to its introduction and passage. While the Act permits the deportation of aliens convicted before and after its passage, the reports of both the Senate Committee (Sen. Rep. No. 283, 66th Cong., 1st Sess.) and the House Committee (H. R. Rep. No. 143, 66th Cong., 1st Sess.) show that the pressing desirability of passage of the Act was occasioned by the presence in the country in 1919 and 1920 of two groups of

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visa, and could not be classed as an "alien" who was "not entitled" under 8 U.S.C. § 214 to enter the United States.

The contention that petitioner was a "native" of Germany and thus removable under 50 U.S.C. § 21, although born in Sarrebourg, Lorraine, a part of France at the time of his internment, was abandoned by the Government below in the light of the decisions in *U. S. ex rel. Gregoire v. Watkins*, 164 F. 2d 137 (2d Cir. 1947) and *U. S. ex rel. Zeller v. Watkins*, 167 F. 2d 279 (2d Cir. 1948). Those cases held that whether an alien is a "native" of a hostile nation depends upon whether his birthplace is within the boundaries of a nation hostile at the time of his arrest.

The further question of whether the cancellation of petitioner's naturalization caused him to become a citizen of Germany turns upon German law, as to which petitioner will introduce proof if the order is reversed and sent back for hearing.

aliens not deportable under any law then on the books. Those two groups were, first, some 500 persons who were interned by the President during the First World War as dangerous alien enemies, and, second, about 150 aliens who during that war had been convicted under various so-called war statutes.

It was stated in the letter of the Attorney General to the Chairman of the Senate Committee, as quoted in its report, "There is no law now on the statute books under which these persons can be excluded from the country, nor under which they can be detained in custody after the ratification of the treaty of peace. Unless H. R. 6750, or a bill similar in character, is passed, it will become necessary, on the ratification of the treaty of peace, to set free all of these dangerous individuals" (Sen. Rep. No. 283, 66th Cong., 1st Sess., p. 2; see also H. R. Rep. No. 143, 66th Cong., 1st Sess., pp. 2-3).

Representative Johnson, in charge of the bill in the House, stated: "The principal necessity is to provide for the deportation of about 500 interned alien enemies who are at Camp Oglethorpe, in Georgia, and Camp Logan, in Utah. Those 500 remain from about 4,000 alien enemies who were interned during the progress of the war" (58 Cong. Rec. 3362).

Representative Wilson, in support of the bill, stated that, "In addition [to the 500 alien enemies interned] • • • there are about 150 who have been convicted under what are known as the war acts as enumerated here, and there is no existing law by which they may be deported" (58 Cong. Rec. 3364).

It was never once suggested either in the Reports or in the Congressional Record that the bill was designed to accomplish the deportation of aliens convicted of various crimes at a time when they were naturalized citizens. It does not appear that Congress was informed that a single

one of the 150 convicted persons whom it was desired to deport had been convicted while a naturalized citizen.

While the specific question of whether Congress should deport aliens who had been convicted of various crimes while citizens and later lost their citizenship, does not appear to have been specifically raised at any time during the debate or in the Reports, there is ample evidence that responsible members of Congress had in mind only aliens who had been convicted of crimes while aliens. Thus, Representative Robsion, in support of the bill and in opposition to an amendment, spoke of "rich foreigners" who would be deported under the bill and stated: "They owed us more than the poor, ignorant foreigners. We permitted them to live here and granted them practically all of the rights of the American citizen. They rewarded our hospitality by joining with our enemies in an effort to destroy us. *As they were not citizens*, they were not required to take up arms in defense of the country in which they had grown rich." (58th Cong. Rec. 3374) (Italics supplied.)

Again, Representative Gard, in support of the bill, stated, "I assume that everybody will agree with that, that if *an alien is tried, is* afforded a fair trial and *is* convicted, then he *is* a proper subject for deportation." (58 Cong. Rec. 3371) (Italics supplied.)

The legislative history therefore confirms the only possible grammatical construction of the language of the Act, namely, that the alien must "be" an alien at the time he is convicted.

It must not be supposed that Congress in 1920 was unaware that naturalized citizens could lose their citizenship. Long prior to the time that the Act of May 10, 1920 was passed, there had been on the statute books the procedure now contained in 8 U. S. C. § 738, providing for judicial proceedings to cancel certificates of naturalization

procured by fraud or illegality. This procedure became law on June 29, 1906 (34 Stat. 601, 603).

Moreover, long before 1920 naturalized citizens might lose their citizenship, not only through revocation for fraud or illegality, but also in many ways not involving moral turpitude. For example, under what is now 8 U. S. C. § 801 a person might lose his United States nationality by obtaining naturalization in a foreign state, by taking an oath or making affirmation or other formal declaration of allegiance to a foreign state, by entering or serving in the armed forces of a foreign state unless expressly authorized by the laws of the United States, by accepting or performing the duties of any office under the government of a foreign state for which only nationals of such state are eligible, by voting in a political election in a foreign state to determine sovereignty, or by making a formal renunciation of nationality. And, for example, under what is now 8 U. S. C. § 804, passed in 1906, a naturalized citizen might lose his United States nationality, with certain exceptions, by residing for certain years in a foreign state.

Therefore, at the time that Congress was discussing and passing the Act of May 10, 1920, it was aware of the possibility that a naturalized citizen could lose his citizenship. But Congress did not in the Act of May 10, 1920 use language which suggests that such persons, convicted while citizens, could or should be deported under the Act. Congress used language which can only be construed to permit the deportation of aliens convicted after 1920 if they were aliens at the time of conviction.

Moreover, Congress knew how to provide in 50 U. S. C. § 21 for the removal of an enemy alien "not actually naturalized" and who thus might have previously been a naturalized citizen. Had Congress desired to authorize the deportation of persons convicted while "actually natu-

ralized," and later denaturalized, it could and would have expressly so provided in the Act of May 10, 1920.

It should be noted that the effect of a decision in this case that petitioner is deportable, though convicted while a citizen, would not be restricted to the Act of May 10, 1920. Similar language in many other provisions for deportation of aliens who have committed a variety of acts could consistently only be construed to permit the deportation of persons who committed such acts as citizens but subsequently lost their citizenship.

Thus 8 U. S. C. § 155 provides for the deportation of, for example (1) "any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute," or (2) "any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute," or (3) "any alien who shall import or attempt to import any person for the purpose of prostitution or for any other immoral purpose," or (4) "any alien convicted and imprisoned for a violation" of 8 U. S. C. § 138 which punishes "whoever shall, directly or indirectly, import, or attempt to import, into the United States any alien for the purpose of prostitution or for any other immoral purpose, or shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, or shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, any alien, in pursuance of such illegal importation," or (5) "any alien who, at any time after entry, shall have on more than one

occasion, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien or aliens to enter or to try to enter the United States in violation of law," or (6) "any alien who, at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semiautomatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun." And 8 U. S. C. § 156a provided for the deportation of any "alien" who "after February 18, 1931, shall be convicted" for violation of any state or federal narcotic law.

Then again 8 U. S. C. § 137 provides that "Any alien who was at the time of entering the United States, or *has been at any time thereafter*, a member of any one of the classes of aliens enumerated in this section" shall be deported. (Italics supplied.) The section includes those "who are members of or affiliated with any organization" that "believes in, advises, advocates, or teaches" or prints, publishes and displays any matter advising the overthrow of the government or all forms of law by force or violence, the propriety of assaulting or killing an officer of organized government, the unlawful damage to property, or sabotage. The section further provides that the giving, loaning, or promising money or anything of value to be used for advising or teaching doctrine shall constitute advising or teaching that doctrine, and the giving, loaning or promising money or anything of value to an organization "shall constitute affiliation therewith." This Court had occasion to consider those provisions in *Bridges* v. *Wixon*, 326 U. S. 135 (1945).

The language of all these provisions for the deportation of aliens is not significantly different from the language of the Act of May 10, 1920. Thus if petitioner is deportable, though convicted while a naturalized citizen, many

once naturalized citizens, convicted while such, will logically be subject to deportation for a variety of offenses, whether they have lost their citizenship because of fraud or illegality or in other ways involving no moral blame.

There is no indication the Congress ever intended that all such persons should be deported. Indeed, there is nothing to show that Congress gave any consideration to the general problem. It can hardly be assumed that Congress, if it had done so, would have thought that all convictions for acts sufficient to require deportation if committed while an alien would all be so heinous as to justify deportation if committed by a citizen who thereafter loses his citizenship.

To say the least, the problem of the deportation of aliens for acts committed while naturalized citizens is one which requires comprehensive consideration by Congress of the nation's policy as to immigration, naturalization, loss of citizenship, and deportation. Many factors are relevant to such consideration. One question would be the manner in which citizenship is lost. For example, Congress might suppose that one who lost his citizenship under 8 U. S. C. § 801 for serving in the armed forces of a foreign state, or under 8 U. S. C. § 804 for having stayed too long in a foreign land, should not be placed in the same category as one whose citizenship is revoked because obtained illegally. Again, Congress might be of the opinion that persons like petitioner, whose citizenship was revoked on consent (R. 36), should not, in the light of war-time fervor surrounding many denaturalizations [*cf. Acheson* v. *Murakami*, C. A. 9, August 26, 1949 (denaturalization of citizens of Japanese ancestry imprisoned at Tule Lake Center set aside); *Klapprott* v. *United States*, 335 U. S. 601 (1949)], be treated in the same manner as one deprived of his citizenship after an active contest [*cf. Knauer* v. *United States*, 328 U. S. 654 (1946)]. Further, Congress might think, for

example, that one who was guilty of a technical illegality in obtaining his citizenship should not be classified in the same manner as one who committed a deliberate fraud going to the merits of his citizenship application.

Another relevant factor would be the type of act committed by the naturalized citizen. Congress might be of the opinion, for example, that, because of the opportunities for abuse, naturalized citizens who import others for "any • • • immoral purpose" [8 U. S. C. § 138] [*cf. Caminetti* v. *United States*, 242 U. S. 470 (1917); *United States* v. *Bitty*, 208 U. S. 393 (1908)] should be dealt with differently from a confirmed burglar. Or again, for example, Congress might think, with due regard for the interests embodied in the First Amendment, that a naturalized citizen who loaned money or something of value to a group which "believes in" the propriety of assaulting a government official [8 U. S. C. § 137] should not, if denaturalized, be placed in the same category as a rapist.

Another consideration would assuredly be the lapse of time between the commission of the crime and the denaturalization. Congress might suppose, for example, that a naturalized citizen convicted of a narcotics violation [8 U. S. C. § 156a] and who lost his citizenship some twenty years later, should not automatically be banished.

Further, Congress might reasonably think that a distinction between aliens convicted as such and those convicted as naturalized citizens should be made because the former alone would be entitled in the criminal trial to the protection of the consul of their foreign government [Wilson, *International Law*, p. 190], which may act through diplomatic or other channels.

It can thus be appreciated that there is scant basis for the assumption of the Court below that Congress intended to make no distinction between aliens convicted as such and aliens who had been convicted while naturalized citi-

zens because in either case the convicted person was equally undesirable (R. 15-16). For the reasons given, it cannot be thought that Congress desired to lump together all such persons, without giving consideration to any of the differences which are relevant to the problem. Congress, when it exercises its considered judgment in the matter, may well conclude that some persons convicted as naturalized citizens are more desirable residents than others convicted as aliens.

To summarize: Congress used language in the Act of May 10, 1920 which, grammatically construed, includes only aliens convicted while aliens and not persons convicted as naturalized citizens. The legislative history of the Act indicates that Congress was thinking only of aliens convicted as such. Although aware that citizenship could be lost in many ways, Congress did not use language, similar to that in other provisions, appropriate to deport persons who had committed acts as citizens. A decision against petitioner in this case would have ramifying significance throughout the entire law of aliens and deportation, a field in which the problems are intricate and delicate, involving basic liberties of person. There is no indication that Congress has given attention to the factors which are of significance in determining what aliens, if any, should be deported for acts committed as citizens. Congress is the body which can give consideration to the problem.

Even if there were doubt as to the meaning of the Act under which it is sought to deport petitioner, this Court has held that such doubt shall be resolved in favor of the alien. Equally relevant to this case are the Court's remarks in *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10 (1948):

> "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo* v. *Carmichael*, 332 U. S. 388. It is the forfeiture for mis-

conduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

Finally, it should be noted that this Court has held that there is no constitutional obstacle to prohibit Congress from now passing laws to accomplish the deportation of aliens for acts which they have already committed. *Mahler* v. *Eby*, 264 U. S. 32, 39 (1924); *Bugajewitz* v. *Adams*, 228 U. S. 585, 591 (1913); *Johannessen* v. *United States*, 225 U. S. 227, 242 (1912). There need be no fear, therefore, that Congress is without power to pass legislation to deport whatever aliens are now within the borders whom it considers dangerous and undesirable. The significant point is that in the Act of May 10, 1920 Congress did not purpose the deportation of one convicted as a citizen.

Point II

Petitioner's Naturalization Certificate Was Complete Evidence of Its Validity Until the Denaturalization, the Effect of Which Was Not Retroactive.

The government argued below that petitioner was an "alien" when convicted in 1942 [although he then held an unquestioned certificate of naturalization and was not denaturalized until two years thereafter, because a) having allegedly obtained his naturalization certificate illegally, petitioner never really was a citizen, or b) the denaturalization somehow "retroactively" made him an alien as of 1942. There is no merit to these arguments.

a) *The naturalization decree was good until set aside*

It is fair to say that the government makes a most extraordinary argument in contending that petitioner, possessed in 1942 for over ten years of a valid, uncancelled, unquestioned certificate of naturalization, was nevertheless then an "alien." Fortunately for the naturalized citizens of the United States there is no warrant for such a monstrous doctrine.

Section 173 of Title 8 provides, in pertinent part, that "The word 'alien' wherever used in this chapter shall include any person not a native-born or naturalized citizen of the United States." Congress has prescribed in 8 U. S. C. § 738 the method by which a certificate of naturalization may be cancelled. Unless and until that judicial procedure has been pursued, a naturalized citizen is as much a citizen as any other and has all the rights of a native-born citizen, other than the right to hold the office of President.

Petitioner had held an unquestioned and uncancelled certificate of naturalization for ten years before he was convicted. He held that certificate at the time of his conviction. That certificate could be attacked only by the direct method provided by Congress. It could not be collaterally attacked. Until cancelled the naturalization certificate "is, against all the world, a judgment of citizenship." As stated by Brandeis, J. in *Tutun* v. *United States*, 270 U. S. 568, 577 (1926) "The judgment [granting a naturalization certificate] entered, like other judgments of a court of record, is accepted as complete evidence of its own validity unless set aside. *Campbell* v. *Gordon*, 6 Cranch 176; *Spratt* v. *Spratt*, 4 Pet. 393, 408. It may not be collaterally attacked. *Pintsch Compressing Co.* v. *Bergin*, 84 Fed. 140."

It has been uniformly held by every decision which has passed on the question that a naturalization decree, valid on its face and issued by a court having jurisdiction, may

not be collaterally attacked. See note 6 A. L. R. 405 ff. collecting cases of all varieties. See also *Behrensmeyer* v. *Kreitz*, 26 N .E. 704 (Ill. 1891) (certificate of naturalization presented by voter); *Johansen* v. *Staten Island Shipbuilding Co.*, 272 N. Y. 140 (1936) (whether a naturalized citizen's wife a citizen); *Oehlert* v. *Oehlert*, 124 N. E. 249 (Mass. 1919) (divorce action); *United States* v. *Ragazzini*, 50 Fed. 923 (C. C. S. D. N. Y. 1892) (indictment for selling naturalization certificate procured by fraud); *United States* v. *Parisi*, 24 F. Supp. 414, 420 (D. C. Md. 1938, per Chesnut, J.) (dictum); *Matter of Wolton*, 125 Misc. 564 (Sup. Ct. N. Y. Co. 1925, per Levy, J.) (same); *In re Fordiani*, 120 Atl. 338 (Conn. 1923) (same). Compare *Yamashita* v. *Hinkle*, 260 U. S. 199 (1922) (invalidity appearing on the face of the certificate); *In re Gee Hop*, 71 Fed. 274 (N. D. Cal. 1895) (same); *Sato* v. *Hall*, 217 Pac. 520 (Cal. 1923) (same); *Rosenberg* v. *United States*, 60 F. 2d 475, 476 (3d Cir. 1932, per Buffington, J.) (dictum, Court issuing decree of naturalization without territorial jurisdiction). Nor can the certificate of naturalization be collaterally attacked on the ground that it has been procured by fraud. *Behrensmeyer* v. *Kreitz*, *supra*; *United States* v. *Gleason*, 78 Fed. 396 (C. C. E. D. N. Y. 1897), *aff'd*, 90 Fed. 778 (2d Cir. 1898); *United States* v. *Aakervik*, 180 Fed. 137 (D. C. Ore. 1910); *United States* v. *Ragazzini*, *supra*.

b) *Petitioner's denaturalization in 1944 did not retroactively make him an alien in 1942*

The government also suggested below that somehow petitioner's denaturalization in 1944 retroactively made him an alien two years earlier when he was convicted in 1942. Indeed this argument appears to have been accepted by the court below in the companion to the instant case, *U. S. ex rel. Eichenlaub* v. *Shaughnessy*, No. 3, this term. The opinion

of the Court of Appeals in the *Eichenlaub case* (167 F. 2d 659-660) justified the deportation on the ground that "the decree of denaturalization relates back" in order to make the citizen an alien at the time of conviction.

There is no basis for this holding. Section 738 of 8 U. S. C., providing for judicial proceedings to cancel certificates of naturalization on the ground of fraud or illegality, did not make petitioner an "alien" at the time of his conviction in 1942. There is nothing in the language or history of the denaturalization section to show that it was intended to affect the meaning of the deportation acts, or retroactively to make naturalized citizens aliens and subject them to penalties for exercising the rights of citizens.

Moreover, soon after that section was originally passed in 1906, it was contended that, since the section permitted the cancellation of a naturalization certificate obtained prior to the passage of the section, the section retroactively imposed punishment upon naturalized citizens and was thus an *ex post facto* law. However, the Court held in *Johannessen* v. *United States*, 225 U. S. 227 (1912, per Pitney, J.), in answer to this argument, that the section did not impose punishment for acts committed prior to its passage, but simply took away the right to exercise for the future the privilege of citizenship after cancellation of the certificate of naturalization. The Court said:

> "The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges. • • • It imposes no new penalty upon the wrongdoer." (p. 242.)

To the same effect see *Luria* v. *United States*, 231 U. S. 9 (1913, per Van Devanter, J.).

This Court thus interpreted the section not to be retroactive but to be prospective only. The cancellation of peti-

tioner's certificate of naturalization in 1944 therefore did not somehow relate back to the time when petitioner was convicted in 1942. It merely placed him after denaturalization in the status of an alien. It did not purport retroactively to place him in a category of aliens who were deportable because of something they had previously done as aliens.

Conclusion

Petitioner is not subject to deportation under the Act of May 10, 1920. While Congress has the power to pass legislation now to deport aliens who have previously committed various acts, it has not done so. If Congress chooses to pass such legislation, it may readily do so.

The judgment should be reversed.

EUGENE H. NICKERSON,
For The Legal Aid Society of New York,
Attorney for Petitioner.

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No. 82

In the Supreme Court of the United States

OCTOBER TERM, 1949.

UNITED STATES EX REL. OTTO A. WILLUMEIT,
PETITIONER

v.

EDWARD J. SHAUGHNESSY, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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Miscellaneous:

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Cable, *Loss of Citizenship*, pp. 4-5 13
58 Cong. Rec. 3362-3376 11
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H. R. 6724, 76th Cong., 3d sess. 7
H. Rep. No. 143, 66th Cong., 1st sess. 7, 13
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S. Rep. No. 283, 66th Cong., 1st sess. 7, 13
S. Rep. No. 918, 76th Cong., 1st sess. 7

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 82

UNITED STATES EX REL. OTTO A. WILLUMEIT, PETITIONER

v.

EDWARD J. SHAUGHNESSY, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 13-16) is reported at 171 F. 2d 773. No opinion was rendered by the District Court (R. 11-12).

JURISDICTION

The petition for a writ of certiorari was filed on May 26, 1949, and certiorari was granted on June 27, 1949 (R. 17, 45). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Act of May 10, 1920, which provides that among the aliens subject to deportation if found to be undesirable residents are "all aliens who since August 1, 1914, have been or may hereafter be convicted" of certain specified offenses, applies to an alien who was a naturalized citizen when he was convicted but has since been denaturalized.

STATUTE INVOLVED

Section 1 of the Act of May 10, 1920, c. 174, 41 Stat. 593-594, 8 U.S.C. 157, provides:

> That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, upon the warrant of the Secretary of Labor, be taken into his custody and deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States," if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States, to wit:
>
> (1) All aliens who are now interned under section 4067 of the Revised Statutes of the United States and the proclamations issued by the President in pursuance of said section under date of April 6, 1917, November 16, 1917, December 11, 1917, and April 19, 1918, respectively.

(2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts, the judgment on such conviction having become final, namely:

(a) An Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917, or the amendment thereof approved May 16, 1918;

* * * * *

STATEMENT

Petitioner was born in 1905 in the Province of Lorraine, then a part of Germany (R. 6, 9, 19). He first entered the United States in September 1925 on a German passport [1] for permanent residence here (R. 19). He was a German citizen at birth and continued in that status until September 16, 1931, when he was naturalized as an American citizen by a judgment of the Superior Court, Lake County, Indiana (R. 9, 22). Thereafter he made several trips outside the country (R. 19) and his last re-entry into the United States was at El Paso, Texas, on October 24, 1941 (R. 9).

In August, 1942, petitioner was convicted in the United States District Court for the District of

[1] His admission was charged, however, against the French quota (R. 14), since Lorraine at that time was *de jure* French territory.

Connecticut on his plea of guilty to a charge of violating Section 4 of the Act of June 15, 1917 (50 U.S.C. 34 [2]), by conspiring with others to violate Section 2 of that Act, which made it a crime punishable by imprisonment up to twenty years to transmit to an agent of a foreign country information relating to the national defense of this country, with intent or reason to believe that such information would be used to the injury of the United States or to the advantage of a foreign nation (R. 39, 21). On August 21, 1942, he was sentenced to imprisonment for five years (R. 39). He was released from service of this sentence in April 1946 (R. 21).

On June 9, 1944, a judgment was entered with the consent of petitioner, in the United States District Court for the Northern District of Illinois, cancelling his naturalization on the ground of illegality and fraud in its procurement (R. 33-37). By order dated May 23, 1946, the Attorney General ordered him removed from the United States as a "dangerous alien enemy," in accordance with 50 U.S.C. 21, and Presidential Proclamation No. 2655 of July 14, 1945, 10 Fed. Reg. 8947 (R. 41).

Subsequently, proceedings were instituted to determine whether petitioner was also subject to deportation. After a hearing before an Immigration Inspector and review by the Board of Immigration

[2] Now 18 U.S.C. 794. The punishment for a violation in time of war is death or imprisonment for not more than thirty years.

Appeals, both of whom made findings of fact, petitioner was ordered deported on the grounds: (1) that he is an undesirable resident, and, as an alien convicted of a violation of one of the acts of wartime legislation specified in the Act of May 10, 1920, c. 174, 41 Stat. 593 (8 U.S.C. 157), he is deportable under that statute; and (2) that he is an alien who re-entered this country in 1941 without a valid immigration visa, and therefore, is deportable under the Immigration Act of May 26, 1924 (8 U.S.C. 213, 214) (R. 10, 14).

A writ of habeas corpus was issued by the District Court for the Southern District of New York and, upon the petition, the return, and the record of proceedings before the officials of the Immigration Service, the writ was ordered dismissed (R. 10). The Court of Appeals for the Second Circuit affirmed the order of dismissal upon the ground that petitioner was properly deportable under the act of May 10, 1920, *supra* (R. 13-16). In view of the sufficiency of this one ground, the court deemed it unnecessary to pass upon the other grounds for his deportation and removal (R. 15).

SUMMARY OF ARGUMENT

A. The Act of May 10, 1920, does not expressly exclude from its provisions aliens who, at the time of their conviction, were naturalized citizens. The presence in the statute of the phrase "may hereafter be convicted" upon which petitioner relies as indicating a legislative inten-

tion that alienage and conviction must be contemporaneous, signifies merely that, in respect of the time of conviction, the statute shall operate prospectively as well as retrospectively. And no reason is apparent why Congress should have excepted from deportation an alien who not only committed one of the specified wartime offenses, but also fraudulently procured his naturalization. The crucial factor is the alien's *present* undesirability as a resident of this country. Under the express terms of the deportation statute, once petitioner was denaturalized, he was deportable because of the past conspiracy conviction regardless of his status at the time of the conviction.

B. If the statute should be construed to require that the alien must have been in that status at the time of his conviction, petitioner nevertheless is within its scope. The cancellation of his naturalization for fraud in its procurement operated to revoke his citizenship *ab initio*, thereby having the legal effect of rendering him an alien at all times.

ARGUMENT

Petitioner is Deportable Despite His Ostensible Status as a Naturalized Citizen at the Time of His Conviction

A. There is, of course, no doubt that power resides in Congress to exclude or expel any class of aliens whose presence in this country it deems harmful. *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Ng Fung Ho* v. *White*, 259 U. S. 276, 280. Only a narrow question of statutory interpretation is presented

here. Petitioner impliedly concedes that deportation under the Act of May 10, 1920, is not confined to persons who were resident aliens when the statute was enacted nor to persons whose crimes were committed at or before that time.[3] But he urges that the statute is limited in this one respect: it does not extend to a person who was a naturalized citizen at the time of his conviction, although he has

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[3] The enactment of the deportation statute of May 10, 1920 (*supra*, pp. 2-3), was occasioned by the desire to deport as undesirable residents about 500 aliens who were then being held in internment camps as dangerous enemy aliens, and, in addition, to deport about 150 aliens who, during World War I, had been convicted of violations of the sabotage act, the espionage act, and various other so-called war statutes. H. Rep. No. 143, S. Rep. No. 283, 66th Cong., 1st sess. The legislation was initiated at the request of Attorneys General Gregory and Palmer who were concerned lest existing law be deemed inadequate for the expulsion of these alien enemies. H. Rep. No. 143 and S. Rep. No. 283, 66th Cong., 1st sess.; see *Ludecke* v. *Watkins*, 335 U.S. 160, 167, n. 12, 179-180. Although the statute was aimed at enemy aliens of World War I, it was couched in general language and thus applies to any alien who may be found within its terms. No time limit was placed upon its operation, and it has not been repealed; hence it has continued effective to the present, and reaches aliens who in World War II committed any of the crimes enumerated in the Act. Clearly, Congress and the executive branch have so regarded the reach of the statute. For example, in 1940, when Congress passed a bill (H.R. 6724, 76th Cong., 3d sess.) to expedite the deportation, among others, of aliens convicted of espionage and sabotage by providing for their automatic expulsion and thereby obviating the need for an administrative finding that they were undesirable residents, there was no suggestion that the 1920 statute had lost its vitality. See H. Rep. No. 829, S. Rep. No. 918, 76th Cong., 1st sess. The bill was vetoed by President Roosevelt because it included a provision for the mandatory deportation of habitual users of narcotic drugs. He explained, however, that ". . . Ample authority is found in the existing law for the deportation of aliens guilty of such activities for the Secretary of Labor [now the Attorney General, to whose direction and supervision the functions of the Immigration and Naturalization Service were transferred,

since been denaturalized for fraud in the procurement.

Petitioner's reliance is placed in part upon the relationship between the noun "aliens" and the words "may * * * be convicted" in the classifying phrase, "All aliens who since August 1, 1914 have been or may hereafter be convicted." He argues (Br. 7) that "There is no other grammatical possibility" but that "the alien must 'be' an alien at the time of conviction." This emphasis upon apparent grammatical construction seems strained. Certainly, if Congress had provided simply for the deportation of all aliens "who since August 1, 1914 have been convicted," an argument based upon grammar would have nothing upon which to rest. The phraseology would clearly cover, for example, a person who had been denaturalized in 1919 and, therefore, was an alien on May 10, 1920, when the statute was enacted, even though his conviction had occurred in 1915 while he was a naturalized citizen. And, in our view, the inclusion of the phrase, "may hereafter be convicted," served only to assure that, *so far as the time of the conviction* was concerned, the statute would operate prospectively as well as retrospectively to August 1, 1914;[4] it

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1940 Reorganization Plan No. V, 54 Stat. 1238, effective June 14, 1940] is already authorized to deport them if, after hearing, it is found that they are undesirable residents of the United States (U.S.C., title 8, sec. 157). Further legislation on this subject appears to be unnecessary and superfluous." Message from the President, H. Doc. No. 689, 76th Cong., 3d sess.

[4] A reference, apparently, to the beginning of World War I.

has no bearing either way upon the question of the criminal's status—i.e., whether he was an alien or naturalized citizen—at the time of his conviction. In any event, to paraphrase Mr. Justice Cardozo, dissenting in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 439: "The meaning of a statute is to be looked for, not in any single word, but in all the parts together and in their relation to the end in view." And as Mr. Justice Holmes observed in another connection: "* * * the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." *United States* v. *Whitridge*, 197 U.S. 135, 143.

Petitioner lays great stress upon an alleged requirement of alien status at the time of conviction. But if that factor is significant, the alien's status at the time of commission of the crime should be no less so. But no argument, even on the basis of grammatical construction, can be advanced that if an alien committed the specified offense while a naturalized citizen, and before conviction, was denaturalized, he would be outside the scope of the statute. Thus, if petitioner had violated the wartime statute in 1941, as he did, but his trial had been delayed until after he was denaturalized, his present contention would clearly be untenable. We submit that there is no sound reason for deducing a Congressional intention to distinguish between an alien whose commission of the crime and conviction antedated his

denaturalization and one whose denaturalization followed the commission but preceded the conviction. The test of present undesirability is equally applicable in both situations.

Petitioner asserts (Br. 9) that the grammatical construction urged by him is supported by the legislative history of the statute since "there is ample evidence that responsible members of Congress had in mind only aliens who had been convicted of crimes while aliens." But he relies solely on two statements, isolated from their context, made during the debate in the House. These expressions by Representatives Robsion and Gard were made in connection with an entirely different problem—namely, a proposal to postpone the deportation of enemy aliens whose property had been seized by the Alien Property Administrator, until their claims might be adjusted. These statements were not intended to, and do not, reflect any opinion whatever in respect of the requisite status at the time of conviction. "To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute * * *." *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542. This is particularly true when the words upon which reliance are placed are not the words of the statute but of individual legislators addressing themselves to other problems.

Scant comfort can be derived by petitioner from the circumstance upon which he relies (Br. 9), that Representative Gard used the present tense in referring to the trial and conviction of aliens. If the use of a particular tense in the course of debate casts any light upon the reach of the statute (which we doubt in view of the undisputed fact (Pet. Br. 9) that the specific question was not raised at any time), it should be noted that the report of the debate in the House[5] is replete with statements by supporters of the bill in which the past participle "has been convicted" was used in reference to all aliens subject to the provision. See 58 Cong. Rec. 3362-3376. Typical is the statement of Representative Black, as follows (58 Cong. Rec. 3372):

> * * * What does this bill do? If I understand it correctly, it does not authorize the deportation of an alien merely because he has been an interned enemy alien; it does not authorize the deportation of an enemy alien, or any other alien, merely because he *has been convicted* of the violation of some of the acts which we passed in aid of the prosecution of the war and which are named in the several subsections of the bill. What it does do is to say to the Secretary of Labor, "If you find, after a hearing, that any interned enemy alien is an undesirable alien, then you shall have the right to enter judgment deporting him, or if

[5] There was no debate on the bill in the Senate. 59 Cong. Rec. 6444.

> you find that any alien in this country, whether from one of the enemy countries or not, *has violated* any of these war laws, such as trading with the enemy act, the espionage act, and others named in this bill, you shall have the right to also deport him after giving him a hearing and after finding as a fact that he is an undesirable resident of the United States." (Italics supplied.)

There is nothing in the legislative history of the Act of May 10, 1920, which shows that Congress considered the precise effect of the statute, one way or the other, upon denaturalized persons. The statute was aimed primarily at a group of about 650 aliens. See *supra*, p. 7, n. 3. It is not improbable, however, that this group included some aliens who were convicted of wartime offenses while they were naturalized citizens. The remedy of denaturalization was a familiar one in 1920 and had been resorted to in a number of cases during and immediately after World War I. See, e.g., *United States* v. *Wursterbarth*, 249 Fed. 908 (D. N.J.); *United States* v. *Kramer*, 262 Fed. 395 (C.A. 5); *Schurmann* v. *United States*, 264 Fed. 917 (C.A. 9); Annual Report of the Attorney General (1918), p. 39.[6]

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[6] "The practice of filing proceedings to cancel certificate of naturalization became widespread immediately after the 1906 Act went into effect. In the fiscal year 1907, there were eighty-six certificates cancelled; in 1908, there were four hundred and fifty-seven; and in 1909, nine hundred and twenty-one. During the thirty years following the effective date of the 1906 Act, more than twelve thousand certificates

Under a long-standing practice, denaturalized persons are included in the category of aliens subject to removal under the Enemy Alien Act of July 6, 1798, as amended (50 U.S.C. 21), if found to be dangerous enemy aliens. Petitioner agrees that this practice is authorized by law (Br. 10). And the Act of May 10, 1920, which was aimed primarily at the expulsion of alien enemies, was not designed to be more restrictive than the Alien Enemy Act. Indeed, the legislation was initiated to supplement the provisions of the latter statute. See letter of May 27, 1919, from the Attorney General to the Chairman of the House Committee on Immigration and Naturalization, 58 Cong. Rec. 3365. The reports of the House and Senate Committees (H. Rep. No. 143 and S. Rep. No. 283, 66th Cong., 1st sess.) stated, in identical language, that "the bill provides for the deportation as undesirable residents of two classes, as follows: (1) Those *alien enemies* at present interned as dangerous alien enemies; (2) Those *alien enemies* convicted of violation of various acts passed in connection with the war." (Italics supplied.)

Since the Alien Enemy Act, as amended, concededly includes denaturalized persons in the class of those "not actually naturalized," it is clear that the vital consideration in alien enemy

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of naturalization were cancelled on the ground of fraud or on the ground that the order and certificate of naturalization were illegally procured." Cable, *Loss of Citizenship*, pp. 4-5.

removal cases is the alien's *present* status—that is, his status as a dangerous enemy alien at the time his removal is sought to be effected. Similarly, therefore, under the Act of May 10, 1920, which, as we have seen, was intended to be as broad in its coverage of aliens as the Alien Enemy Act, an alien is subject to deportation notwithstanding his previous naturalization or his status at the time of his conviction.

Whether or not denaturalized persons were among the group whose presence prompted the legislation, the statute was couched in general language to cover future situations and persons as well as then existing ones and, therefore, it extends to any alien who may be found within its terms. See, *supra*, p. 7, n. 3. That the Congress in 1920 did not explicitly deal with the problem here presented is inadequate ground for denying application to a situation well within the general purpose of the statute as well as the legislative language. In *Barr* v. *United States*, 324 U. S. 83, 90, the Court stated: "* * * If Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." The problem then is, "* * * which choice is it the more likely that Congress would have made?" *Burnet* v. *Guggenheim*, 288 U. S. 280, 285. Or, as stated recently in *Vermilya-Brown* v. *Connell*, 335 U. S. 377, 388:

> Under such circumstances, our duty as a Court is to construe the * * * [crucial words] as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind.

Since petitioner's contention that he may not be deported because he was a naturalized citizen at the time of his conviction is essentially an argument that, having obtained the status of a naturalized citizen by fraud he thereby is beyond the reach of the statute, the question here is whether Congress intended that he should enjoy an immunity which he, as an alien, would not have had but for the perpetration of the fraud.

No reason is apparent why Congress should have made an exception in favor of an alien who fraudulently procured his naturalization and while in the guise of a citizen committed a wartime offense. The crucial factor is petitioner's *present* undesirability to continue to be a resident of this country.[7] As the Court stated in *Mahler* v. *Eby*, 264 U. S. 32, 39: "Congress by the Act of 1920 * * * was, in

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[7] On this point the Board of Immigration Appeals stated (R. 21):

"* * * Respondent's conviction under the Act of June 15, 1917 is by itself enough to justify us in finding respondent to be an undesirable resident of the United States. *Mahler* v. *Eby*, supra. If additional evidence were necessary, and we do not think it is, this record contains ample evidence upon which a finding of undesirability can be made. There is undisputed evidence in this record that respondent was a member of the German-American Bund from September 1937 until its dissolution in December 1941. From 1939 on Respondent was the

the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society." Certainly, petitioner's conviction in 1942 when he was a naturalized citizen is as much evidence of his present unfitness to continue to reside in this country as would be the conviction of an alien who had never procured citizenship. The probative force of the conviction on his desirability as a resident is no more dependent upon his status at the time of conviction than upon the continuance in effect of the wartime statutes for violation of which the aliens were convicted in *Mahler* v. *Eby, supra.* Here, just as in *Mahler* v. *Eby,* in which the wartime statutes had been repealed, the convictions retain all "probative force rightly belonging to them." 264 U. S. at 40. If anything, this is an *a fortiori* situation, for not only has the petitioner committed a wartime crime against this country but he did so while ostensibly owing the allegiance of a citizen. Moreover, not only did he commit the crime for which he was convicted but he also committed a fraud against the Government for which he was denaturalized.

In *United States ex rel. Brazier* v. *Commissioner of Immigration,* 5 F. 2d 162 (C.A. 2), it was urged

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Chicago unit leader of this un-American organization. In January 1945 the Attorney General found respondent to be potentially dangerous to the security of this country and ordered his internment. On May 23, 1946 the Attorney General directed respondent's removal from the United States. We find that respondent is an undesirable resident of the United States."

that the Act of May 10, 1920 was impliedly limited to instances where the crime had been committed within five years after the alien's entry into this country—the argument being that the 1920 statute had assimilated the limitation provisions of a prior deportation statute. But the court rejected this view, stating (5 F. 2d at 164):

> * * * it is clear from consideration of the nature of and occasion for the Espionage and Selective Service Acts, and the language of the act of 1920, that persons, who had been or might thereafter be actually convicted of offending against measures adopted only to preserve the life of the nation in time of war, were in a class by themselves, and that class was to be treated in a way of its own, not like other aliens who had not manifested aggressive hatred of the land they chose to inhabit.
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> Men such as these relators had had no chance in time of peace to show how they would behave in time of war. They were typical of a class, which, if not discovered only under war conditions, rendered itself so markedly harmful to the national life in 1917-1919, that its members were singled out for removal from a community they evidently wished to injure or destroy. *No reason could or can be shown why the Congress should restrict removal to those who offended before they had perhaps time to become acclimated, and free those who by long residence had learned how to do the more harm. Length of years in residence only added to gravity of offense. Therefore it is reasonable to read the words of the 1920 act literally, and*

> *to hold, as we do, that aliens convicted under the statutes referred to may, if found undesirable, be deported at any time.* [Italics supplied.]

Support for the view that petitioner is deportable now even though at the time of his conviction in 1941 he was not subject to deportation may be found in analogous situations. In *Lapina* v. *Williams*, 232 U. S. 78, the Court held that the Immigration Act of 1907, which made deportable any alien found practicing prostitution within three years after entry into the United States, applied to an alien who engaged in prostitution upon return from a temporary sojourn abroad, despite the fact that she had been domiciled in this country for ten years prior to the enactment of the statute. In rejecting any implied exception in her favor, the Court said (232 U. S. at 91-92):

> Upon a review of the whole matter, we are satisfied that Congress, in the act of 1903, sufficiently expressed, and in the act of 1907 reiterated, the purpose of applying its prohibition against the admission of aliens, and its mandate for their deportation, to *all aliens whose history, condition or characteristics brought them within the descriptive clauses, irrespective of any qualification arising out of a previous residence or domicile in this country* * * * *None of these excluded classes* * * * *would be any less undesirable if previously domiciled in the United States.* [Italics supplied.]

In *Mahler* v. *Eby*, 264 U. S. 32, aliens detained for deportation under the Act of May 10, 1920, charged that the statute was an *ex post facto* law, because the offenses of which they were convicted, as well as the convictions, occurred before its passage. But the Court disposed of this argument with the observation that (264 U. S. at 39): "It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment * * *." Cf. *Lauria* v. *United States*, 271 Fed. 261 (C.A. 2), certiorari denied, 257 U. S. 635.

Petitioner contends (Br. 12-13) that if he is subject to deportation "many once naturalized citizens, convicted while such, will logically be subject to deportation for a variety of offenses, whether they have lost their citizenship because of fraud or illegality or in other ways involving no moral blame." But we are concerned here, of course, only with the impact of one particular statute, the Act of May 10, 1920, upon a particular alien who has been convicted of conspiracy to commit espionage, denaturalized for fraud, and found, after hearing, to be an undesirable resident. Whatever considered Congressional judgment might be in the hypothetical cases propounded by petitioner (Br. 13-14), he suggests no basis for doubting, and there can be no doubt, that one who has been found guilty of the criminal and fraudulent acts which petitioner committed would be afforded no greater rights than an alien, never a citizen, who committed no fraud on the United

States. And since, as we have shown, *supra*, pp. 14-15, it is for this Court to determine, under circumstances like that here involved, what Congress would have done had it been faced with the precise problem that is now before the Court, it is not relevant that Congress might have decided differently when faced with a variety of other and different problems under different deportation statutes.

Under the statute here involved, aliens, including those who at one time held certificates of naturalization, can be deported only upon a showing of conviction of specified crimes and a finding of undesirability. We can envisage no circumstances in which, upon such showing and finding, Congress would have balked at deportation. In the first place, a naturalized citizen normally does not anticipate that his citizenship at the time he commits a crime will immunize him from criminal prosecution. Certainly, a citizen is no more free to commit a crime of espionage than an alien; that being so, petitioner or any other naturalized citizen did not, and could not, place such reliance on his ostensible citizenship as to warrant the implication of any kind of estoppel which would bar his deportation when he is denaturalized. Secondly, if there should be any seeming hardship because of the lapse of time between the commission of the offense and the deportation, the hardship is attributable to the absence of any time limitation upon deportation proceedings for certain offenses

and may be present in the case of aliens who never became citizens as much as in the case of aliens who once held certificates of naturalization. "No time limitation is imposed upon proceedings under the Act of May 10, 1920." *Mahler* v. *Eby*, 264 U. S. at 46. There is no sound reason for a distinction between aliens who have lived in this country for many years and are subject to deportation for offenses committed some time ago and persons who, after committing the crimes, either relinquish their citizenship voluntarily or have it taken from them because of illegality or fraud.

If there are grounds for alleviation, for allowing one who has been convicted of a specified crime to remain in this country, the Act of May 10, 1920, *supra*, pp. 2-3, leaves room for administrative dispensations. For, under that Act, the alien must be found to be an "undesirable resident" before he can be deported.

The fact that an alien who committed a deportable offense while naturalized would not have been deportable at the time of his conviction affords no legal basis for holding that he may not be deported upon his denaturalization. When his citizenship is cancelled, he stands on the same footing as any other alien who committed the offense and, like him, must meet the test of present desirability. Cf. *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 426, in which the Court said: "It may be true that if Volpe had remained within the United States, he could not have been expelled

because of his conviction of crime in 1925, more than five years after his original entry; but it does not follow that after he voluntarily departed he had the right of reentry."

Except for the requirement that the alien be found to be an undesirable resident (a qualification that was apparently inserted primarily for alien enemy internees (cf. *Mahler* v. *Eby*, 264 U. S. 32, 42)), the Act of May 10, 1920 was not designed to be more restrictive than the general deportation statute of February 5, 1917, which provides, *inter alia*, for the deportation of aliens "more than once" sentenced on account of crimes involving moral turpitude.[8] If petitioner's argument as to the limited scope of the 1920 statute is valid, it would apply with equal force to this part of the 1917 statute. It would mean, therefore, that if an alien obtained his naturalization by fraud and during most of his subsequent stay in this country was imprisoned for repeated crimes (cf. *Fong Haw Tan* v. *Phelan*, 333 U. S. 6), after which he was denaturalized, he, as an alien, could not be deported

[8] The 1917 deportation statute (Act of February 5, 1917, c. 29, § 19, 39 Stat. 889, 8 U.S.C. 155) provided for the deportation of undesirable aliens generally, including "any alien who, is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry." The 1920 statute avoided the bar of the five-year period, as well as any question whether violations of the wartime acts involved moral turpitude.

under the 1917 act until the country shall have suffered the commission of at least two additional crimes. The implausibility of such a result serves to reinforce our argument that the primary thrust of the statute is toward ridding the nation of undesirable aliens, and it is immaterial whether their undesirability is reflected in conduct before or after their denaturalization.

B. The conclusion that petitioner is subject to deportation may be reached by another route—that taken by the Court of Appeals in the *Eichenlaub* case (No. 3, this Term). The judgment by which petitioner was denaturalized determined that he was not qualified for naturalization at the time of its procurement and that the certificate of naturalization was void. Petitioner was entitled to become a citizen only upon strict compliance with the requirements imposed by Congress. Denaturalization results in "the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled." *Luria* v. *United States*, 231 U. S. 9, 24; cf. *Johannessen* v. *United States*, 225 U. S. 227. Consequently, even if the Act of May 10, 1920, be construed to embody a requirement that the alien sought to be deported must have been an alien at the time of his conviction, we submit that the requirement is met in this case since the denaturalization of petitioner operated *ab initio* to deprive him of any claim to citizenship.

Support for this view may be found in the analogous effect of denaturalization upon derivative rights of citizenship. The rights of all persons claiming citizenship by virtue of the naturalization of another are vitiated *ab initio* by the denaturalization of the latter since "the certificate of naturalization was simply a paper fraud and conferred at the time of its grant no rights whatever upon * * * [the applicant]." *Rosenberg* v. *United States*, 60 F. 2d 475, 476 (C.A. 3), certiorari denied, 287 U. S. 645. Cf. *United States* v. *Schlotfeldt*, 136 F. 2d 935, 939-940 (C.A. 7), certiorari denied *sub nom. Krause* v. *United States*, 327 U. S. 781; *Battaglino* v. *Marshall*, 172 F. 2d 979, 981 (C.A. 2), certiorari denied, October 10, 1949, No. 91. In Section 338(d) of the Nationality Act of 1940 (54 Stat. 1159, 8 U.S.C. 738 (d)),[9] Congress changed the effect of cancellation of a certificate for *presumptive* fraud upon those claiming derivatively under the certificate but it expressly retained the effect of a cancellation for *actual* fraud. Thus any rights others may have claimed by virtue of petitioner's naturali-

[9] "The revocation and setting aside of the order admitting any person to citizenship and canceling his certificate of naturalization under the provisions of subsection (a) of section 338 shall not, where such action takes place after the effective date of this Act, result in the loss of citizenship or any right or privilege of citizenship which would have been derived by or available to a wife or minor child of the naturalized person had such naturalization not been revoked, but the citizenship and any such right or privilege of such wife or minor child shall be deemed valid to the extent that it shall not be affected by such revocation: *Provided*, That this subsection shall not apply in any case where the revocation and setting aside of the order was the result of actual fraud."

zation were lost *ab initio* upon his denaturalization for fraud, since, in legal contemplation, he was never a citizen. Consistency with this rationale warrants the view that petitioner's ostensible naturalization was a nullity and, therefore, he was an alien at the time of his conviction in 1941.

Petitioner's contention (Br. 17-18) that a decree of naturalization may not be attacked collaterally is beside the point. No attempt has been made here to attack the judgment of naturalization. It was attacked *directly* in the denaturalization proceeding which resulted, we maintain, in rendering him an alien at all times.

Petitioner relies upon *Johannessen* v. *United States*, 225 U. S. 227, for support for his contention that the order of denaturalization did not operate retroactively to make him an alien at the time of his conviction. But the *Johannessen* decision is consistent with our position. The Court held in that case that although the denaturalization provisions of the Act of 1906 had retrospective effect (so as to effect the cancellation of a naturalization certificate procured fourteen years before its enactment), the Act was not void as an *ex post facto* law since it imposed "no new penalty upon the wrongdoer" but merely provided that "he shall be deprived of a privilege that was never rightfully his." To the same effect, petitioner's denaturalization did not impose any additional punishment for the crime of which he was convicted in 1941. It established merely that he had never validly procured

citizenship and hence was an alien at that time. His deportation flows, not from the order of denaturalization, but from the deportation statute, which is applicable without distinction to aliens who fraudulently procured naturalization and to those who never instituted naturalization proceedings. As the Court observed in *Mahler* v. *Eby*, 264 U. S. 32, 39:

> Congress by the Act of 1920 was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society.

Cf. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.[10]

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[10] In the event of a reversal of the judgment, we suggest that the case be remanded to determine whether petitioner is removable as a "dangerous alien enemy" under 50 U.S.C. 21. See p. 4, *supra*.

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